Supreme Court, U.S.
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No. 04 315

IN THE

Supreme Court of the United States

WILFERT BROTHERS REALTY COMPANY, ET AL.,

Petitioners,

v.

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

JOINT PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Massachusetts Fair Employment Practices Act, Mass. Gen. Laws ch. 151B, *employees* may remove their claims of employment discrimination to court and obtain a jury trial, but *employers* defending against such claims have no corresponding right. In 1997, the Massachusetts Supreme Judicial Court held that this inequity violated the Equal Protection Clause of the Fourteenth Amendment, but earlier this year, in the decision below, the court reversed itself. The question presented for review is:

Does a state statute that permits employees claiming employment discrimination, but not employers accused of such discrimination, to remove the case to state court for a jury trial violate the Equal Protection Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

Petitioners (appellants below) are Wilfert Brothers Realty Company, Keyland Corporation, John Kheary and the Massachusetts Bay Transportation Authority.

Respondents (appellees below) are the Massachusetts Commission Against Discrimination, David Keeling, Brenda Raffurty and Geraldine Ross.

Stonehill College and Soo Tang Tan were parties below, but are neither petitioners, nor respondents on this petition.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Wilfert Brothers Realty Company has no parent company, and no publicly held corporation holds 10% or more of its stock.

Petitioner Keyland Corporation has no parent company, and no publicly held corporation holds 10% or more of its stock.

Petitioner Massachusetts Bay Transportation Authority is a body politic and corporate and a political subdivision of the Commonwealth of Massachusetts. Mass. Gen. Laws ch. 161A, § 2. The disclosure requirements of Rule 29.6 are, therefore, inapplicable to it.

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PETITION FOR WRIT OF CERTIORARI

Wilfert Brothers Realty Company, Keyland Corporation, John Kheary and the Massachusetts Bay Transportation Authority respectfully petition for a writ of certiorari to review the judgment of the Massachusetts Supreme Judicial Court.

OPINIONS BELOW

The opinion of the Supreme Judicial Court is reported at 441 Mass. 549 (2004) and is reprinted at A. 1a. The order of the Supreme Judicial Court denying the petition for rehearing *en banc* is unreported and is reprinted at A. 65a. The Opinion of the Single Justice of the Massachusetts Appeals Court granting interlocutory appeal in *Stonehill Coll. v. Massachusetts Comm'n Against Discrimination* is unreported and is reprinted at A. 79a. The Superior Court Report of Interlocutory Order of *Wilfert Bros. Realty Co. v. Massachusetts Comm'n Against Discrimination* is unreported and is reprinted at A. 85a. The Superior Court Report of Interlocutory Order of *Keyland Corp. v. Massachusetts Comm'n Against Discrimination* is unreported and is reprinted at A. 88a. The Superior Court Report of Interlocutory Order of *Massachusetts Bay Transp. Auth. v. Massachusetts Comm'n Against Discrimination* is unreported and is reprinted at A. 92a.

JURISDICTION

The judgment of the Supreme Judicial Court was entered on May 6, 2004, and a petition for rehearing was denied by the Supreme Judicial Court on June 3, 2004. A. 65a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Relevant provisions of Mass. Gen. Laws, ch. 151B, §§ 5 and 9 are reprinted at A. 67a-78a.

STATEMENT OF THE CASE

The Massachusetts employment discrimination law, Mass. Gen. Laws ch. 151B, provides that employees may remove their claims of employment discrimination from the Massachusetts Commission Against Discrimination ("MCAD") to the Superior Court, where they have a state constitutional right to a jury trial, but makes no corresponding provision for employers. See Mass. Gen. Laws ch. 151B, § 9 (2002); A. 76a-78a.

In 1997, the Supreme Judicial Court expressly relied upon federal constitutional law in holding that employers have an equal protection right to a cognate removal provision. *Lavelle v. Massachusetts Comm'n Against Discrimination*, 426 Mass. 332, 337 (1997); A. 101a-112a. In the decision below, however, the Supreme Judicial Court reversed itself and held that employers no longer have an equal protection right to removal for a jury trial; A. 17a. In so doing, the Supreme Judicial Court *a fortiori* interpreted the federal constitution. Petitioners are employers seeking to vindicate their *state* constitutional right to a jury trial under *federal* equal protection principles.

A. Statutory Context and Interpretive Background

Chapter 151B requires employees who maintain that they have been discriminated against in employment in violation of Mass. Gen. Laws ch. 151B, § 4, to bring their claims in the MCAD, an administrative agency established by the Commonwealth to hear and decide such claims. Mass. Gen. Laws ch. 151B, § 5 (2002). A. 67a-75a. After a claim has been at the MCAD for 90 days, however, an employee — but not an employer charged

with discrimination — has the right to remove the claim to the Superior Court. Mass. Gen. Laws ch. 151B, § 9 (2002). A. 76a-78a.

In 1994, the Supreme Judicial Court held that employees seeking damages on the basis of a claim of sex discrimination who exercised this removal right were entitled to a jury trial in the Superior Court under art. 15 of the Massachusetts Declaration of Rights. See *Dalis v. Buyer Adver., Inc.*, 418 Mass. 220, 223 (1994). The court extended this principle to claims of disability discrimination in *Whalen v. NYNEX Info. Res. Co.*, 419 Mass. 792, 795 (1995), and to claims based upon all other bases of discrimination under Mass. Gen. Laws ch. 151B, § 4, in *MacCormack v. Boston Edison Co.*, 423 Mass. 652, 655 (1996). Under art. 15 of the Declaration of Rights of the Massachusetts Constitution, the parties in all controversies concerning property, and in all suits between two or more persons, have a right to a jury trial which "shall be held sacred. . . ." Mass. CONST. art. XV.

Four years after *Dalis*, an employer who had been named as a respondent in a complaint of sex discrimination filed with the MCAD brought an action in the Superior Court, asserting a reciprocal jury trial right based upon the Equal Protection Clause of the Fourteenth Amendment. See A. 106a. The Supreme Judicial Court agreed and concluded that the Fourteenth Amendment requires that:

> If one side to a dispute has a constitutional right to a jury trial, generally the other side must have a similar right. We are dealing here with a fundamental right (art. 15 says the right is sacred), and differing treatment of complainants and respondents in respect

> to the availability of that fundamental right . . . cannot be justified.

(footnote omitted) A. 108a.

The court accordingly held that after a final decision by the MCAD, employers have a right to remove an administrative claim of discrimination to Superior Court and to claim a jury trial. A. 109a. While vindicating employers' equal protection rights to a jury trial, this remedy deferred to the legislative scheme by postponing employers' exercise of their jury trial rights until after completion of the MCAD process, thus permitting conciliation efforts and administrative hearings prior to removal. See A. 109a.

In the seven years since *Lavelle* employers have been requesting jury trials under the procedural structure set forth by the court in *Lavelle*, and the trial courts have been addressing a number of procedural questions surrounding implementation of that decision relative to the filing of the complaint, the admissibility of the administrative decision in a *de novo* proceeding, and other evidentiary issues at the trial. These practical questions ultimately led to the four cases below being reported to the Appeals Court and the Supreme Judicial Court's granting direct appellate review and then pairing the appeals for purposes of oral argument.

Initially, each of the four cases proceeded to the Supreme Judicial Court on its own track. Following oral argument in the first of the cases, however, the Supreme Judicial Court invited the parties in all four pending cases and any other interested parties to submit briefs concerning the correctness of the court's earlier decision in *Dalis v. Buyer Adver., Inc.*, 418 Mass. 220, that art. 15 of the Declaration of Rights of the Massachusetts Constitution entitles employees in

employment discrimination cases to a jury trial. See A. 58a. As the Supreme Judicial Court later explicitly recognized in its decision on the merits, "[n]ecessarily contained in that request was a corollary issue calling for the parties and interested parties also to express views on the subsequent extension of the *Dalis* holding, in *Lavelle*, [ ] to respondents in administrative proceedings before the MCAD pursuant to Mass. Gen. Laws ch. 151B, § 5 [based upon the Fourteenth Amendment of the United States Constitution]." A. 4a. Numerous interested parties responded to the court's invitation and filed memoranda on various principles at issue in the *Dalis* and *Lavelle* decisions, focusing in large part upon possible practical modifications to the procedure that *Lavelle* had established.

B. The Four Underlying Cases

The following four cases were paired for the argument by the Supreme Judicial Court.

Wilfert Brothers Realty Co. v. Massachusetts Comm'n Against Discrimination and David Keeling

In 1993, David Keeling filed a complaint for disability discrimination with the MCAD alleging that he was unlawfully terminated by Wilfert Brothers Realty Company ("Wilfert Bros."). After an administrative hearing, the MCAD entered a decision against Wilfert Bros. and awarded Keeling $1,450 in lost wages and $35,000 in emotional distress damages. Wilfert Bros. petitioned for review to the full commission and notified the MCAD and Keeling of its intention to seek a jury trial under *Lavelle*. The full commission affirmed the decision. Wilfert Bros. then

filed a complaint in the Superior Court, requesting a *de novo* jury trial or, alternatively, judicial review of the final MCAD decision pursuant to the state Administrative Procedure Act, Mass. Gen. Laws ch. 30A. The trial court denied motions by the MCAD and Keeling to strike the claim for a jury trial and, pursuant to Mass. R. Civ. P. 64, reported the following question to the Appeals Court:

> Did Wilfert Bros. Realty Co. waive its right to a jury trial by not asserting its claim until after the decision of the MCAD hearing officer, but before the Full Commission affirmed that decision, when the decision was issued more than three years after the claim arose?

A. 86a–87a. The Supreme Judicial Court granted Wilfert Bros.' application for direct appellate review.

Keyland Corp. and John Kheary v. Massachusetts Comm'n Against Discrimination and Brenda Raffurty

In 1994, Brenda Raffurty filed a claim with the MCAD against Keyland Corporation and John Kheary (together, "Keyland") alleging that she was subjected to sexual harassment in violation of Mass. Gen. Laws ch. 151B. After an administrative hearing, the MCAD entered a decision against Keyland and awarded Raffurty $100,000 in emotional distress damages. Keyland petitioned for review to the full commission and notified the MCAD and Raffurty of its intention to seek a jury trial. The full commission affirmed the decision. Keyland then filed a complaint in the Superior Court, requesting a *de novo* jury trial or, alternatively, judicial review of the final MCAD decision pursuant to Mass. Gen. Laws ch. 30A.

Following a decision on numerous procedural motions relating to the jury trial of the case, the trial court, pursuant to Mass. R. Civ. P. 64, reported the correctness of its decision to the Appeals Court. A. 88a. The Supreme Judicial Court granted the MCAD's and Raffurty's application for direct appellate review.

Massachusetts Bay Transp. Auth. v. Massachusetts Comm'n Against Discrimination and Geraldine Ross

In 1994, Geraldine Ross filed a claim with the MCAD against the Massachusetts Bay Transportation Authority ("MBTA") alleging disability discrimination. After an administrative hearing, the MCAD entered a decision against the MBTA and awarded Ross $81,000 in lost wages and $50,000 in emotional distress damages. The full commission affirmed the decision. The MBTA then filed a complaint in the United States District Court for the District of Massachusetts because Ross had alleged a federal claim under the Americans with Disabilities Act ("ADA"). After the Chief Judge of the District Court, in open court, stated his intention to certify the question of the MBTA's right to a jury trial to the Supreme Judicial Court, Ross's counsel waived all federal claims which resulted in the immediate dismissal of the case due to lack of federal jurisdiction over the remaining state law claims. The MBTA filed a complaint in Superior Court requesting a *de novo* jury trial or, alternatively, judicial review of the final MCAD decision pursuant to Mass. Gen. Laws ch. 30A. The trial court judge granted the MCAD's and Ross's motion to dismiss the jury trial claim on the limited ground that the MBTA was a governmental entity not entitled to a jury trial based upon dicta set forth in footnote eight of *Lavelle*,

but simultaneously, pursuant to Mass. R. Civ. P. 64, reported the following question to the Appeals Court:

> In a proceeding under Mass. Gen. Laws ch. 151B, does a governmental respondent like the MBTA have a right to trial by jury when the complainant does not elect a judicial determination of her claim?

A. 93a. The Supreme Judicial Court granted the MBTA's application for direct appellate review.

Stonehill Coll. v. Massachusetts Comm'n Against Discrimination and Soo Tang Tan

In 1995, Soo Tang Tan, a professor of mathematics at Stonehill College ("Stonehill"), filed a complaint with the MCAD alleging that Stonehill discriminated against him on the basis of race and color. After an administrative hearing, the MCAD found against Stonehill and awarded Soo Tang Tan $94,387 in back pay, an undetermined amount of front pay and $150,000 in emotional distress damages. The full commission affirmed the decision. Stonehill then filed a complaint in the Superior Court requesting judicial review of the final MCAD decision and, should its administrative appeal be unsuccessful, a *de novo* jury trial. The Superior Court denied Soo Tang Tan's motion to dismiss Stonehill's *de novo* jury trial claim, but ordered Stonehill to elect within 30 days to pursue a jury trial or an administrative review. A single justice of the Appeals Court granted Stonehill leave to pursue an interlocutory appeal of that order, A. 79a, and the Supreme Judicial Court granted Stonehill's application for direct appellate review.

C. Supreme Judicial Court Proceedings

In October of 2003, the Supreme Judicial Court, *sua sponte*, issued an order requesting the parties in all four pending cases and any other interested parties to submit briefs addressing "various issues raised by the parties as well as the additional question, not raised by the parties, whether *Dalis v. Buyer Adver., Inc.*, 418 Mass. 220 (1994) was correctly decided." A. 58a.

The court paired all four cases for oral argument and received numerous briefs from the parties and *amici* — none of whom argued that *Dalis* should be overturned.

In the decision below, the Supreme Judicial Court concluded that *Dalis* correctly held that employees who removed their claims to Superior Court were entitled to a jury trial under the state constitution; however, a majority of the court found that *Dalis* "does not require, as a matter of State constitutional law, the result reached by this court in *Lavelle*." *Stonehill Coll. v. Massachusetts Comm'n Against Discrimination*, 441 Mass. 549, 552 (2004); A. 5a. This statement, of course, overlooked the fact that *Lavelle* had been decided as a matter of federal, not State, constitutional law. A. 106a. The court then revisited the equal protection question, and concluded that *Lavelle's* analysis had failed to recognize the statutory distinction between the administrative proceedings that take place under the statute if the employee does not remove the case, see Mass. Gen. Laws ch. 151B, § 5 (2002), and the judicial proceedings, including the constitutional right to a trial by jury, that instead take place if the employee removes the case to Superior Court, see Mass. Gen. Laws ch. 151B, § 9 (2002). A. 16-17a. Accordingly, the court held, "the jury trial holding in *Lavelle* should be overruled." A. 17a.

Justice Cowin dissenting, concluded that overruling *Lavelle*, while preserving *Dalis*, reinstated an "unconstitutional asymmetry" that treats employees and their employers unequally. A. 51a.

Petitioners to this Court then filed a petition for rehearing, specifically requesting that the court reconsider the federal constitutional rights of employers as a basis for reversing itself. A. 59a. The petition urged the Supreme Judicial Court to uphold *Lavelle*, because the majority opinion failed to expressly address the Fourteenth Amendment analysis that originally formed the basis of *Lavelle's* recognition that employers must have the same right to remove a claim to court for a jury trial as the statute gives to employees. The court summarily denied the petition for rehearing. A. 65a.

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve The Split Between Several Highest State Courts Concerning The Deprivation Of Fundamental Jury Trial Rights Guaranteed By The Fourteenth Amendment

The decision by the Supreme Judicial Court reversing its prior decision in *Lavelle* creates an active split between several highest state courts and warrants this Court's superintendence and guidance. There is an ever-deepening divide between the highest courts of various states concerning equal protection jury trial rights of employers under state anti-discrimination statutes which contain a one-sided opt-out or bypass provision from the reviewing state administrative agency. *Stonehill* epitomizes the need for federal court guidance where many state courts are struggling with the issue of whether the Equal

Protection Clause of the Fourteenth Amendment requires equal availability of jury trial rights to employees claiming discrimination and to employers accused of discrimination.

Essentially, the divide separates the highest courts of Hawaii and Rhode Island, which recognize that employers must be provided a jury trial under their respective Fair Employment Practices Acts if a similar fundamental right is given to employees, from the highest courts of Massachusetts (post-*Stonehill*), Missouri and Tennessee, which have found ways to justify asymmetric jury trial rights.

For instance, the Hawaii Supreme Court recently held that the Hawaii anti-discrimination statute which provides employees before the state administrative agency, but not employers, the option of pursuing their claims in a court of law violates employers' constitutional jury trial rights. *SCI Mgt. Corp. v. Sims*, 71 P.3d 389, 401-03 (Haw. 2003). Specifically relying upon and adopting the Fourteenth Amendment analysis set forth in *Lavelle*, the Hawaii court concluded that an employer before the Human Rights Commission was entitled to a jury trial with respect to claims that seek traditional forms of legal relief in light of the fundamental nature of the right to a jury trial. *SCI Mgt. Corp.*, 71 P.3d at 402-03.

Similarly, the Rhode Island Supreme Court concluded that the procedure provided in Rhode Island's Fair Employment Practices Act for resolving employment discrimination charges was unconstitutional because it deprived employers the right to elect either a hearing before the commission or a jury trial in the Superior Court, while granting this same right to employees. *FUD's Inc. v. Rhode Island*, 727 A.2d 692, 697-98 (R.I. 1999). Like Massachusetts and Hawaii, the Rhode Island statute permitted only

employees to bypass a hearing before the administrative commission and to pursue a jury trial, while denying employers such an option, effectively precluding employers' jury trial rights. *Id.*[1]

Massachusetts has the unique distinction of being on one side of the divide, with Hawaii and Rhode Island, for the seven years while *Lavelle* remained good law, and then helping to create a split which adds to the results obtained by Missouri and Tennessee. Ultimately, Missouri and Tennessee allow the same result as the court below, although neither state court expressly confronts or rejects federal equal protection analysis.

Recently, the Missouri Supreme Court relied upon Seventh Amendment federal case law to hold that jury trial rights attach to an employment discrimination claim under its state statute once in court. However, even though the statute gave employees the right to remove such cases to court it did not give employers the right to opt-out of administrative proceedings and, by implication, deny an employer a right to a trial by jury. *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 89-90 (Mo. 2003). The Missouri Supreme Court did not expressly rest its decision on any federal equal protection argument.

Likewise, two decisions of Tennessee courts, when considered together, result in a similar disparity. Yet the Tennessee courts' decisions do not consider a federal equal protection challenge either. Recently, the Tennessee Appeals Court recognized that employees who bring claims of discrimination, pursuant to the Tennessee Human Rights Act, in state

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[1] The Rhode Island Legislature subsequently amended the Rhode Island Fair Employment Practices Act to permit removal by both parties 20 days after the state agency completes its investigation. R.I. Gen. Laws § 28-5-24.1(c)(1) (1999).

court are entitled jury trials. *Univ. of Tennessee of Chattanooga v. Farrow*, No. 00-02386, 2001 Tenn. App. LEXIS 615, at *14-17 (Tenn. Ct. App. Aug. 16, 2001). Citing prior Tennessee precedent in *Plasti-Line Inc. v. Tennessee Human Rights Comm'n*, 746 S.W.2d 691, 692 (Tenn. 1988), the *Farrow* court acknowledged that an employee who elects administrative relief is not entitled to a jury trial. *Id.* at 18.[2]

This petition presents the opportunity for this Court to resolve the ever-deepening divide between states' highest courts having interpreted federal equal protection guarantees to similar state statutes in diametrically-opposed ways. This Court's guidance is required to ensure uniformity of interpretation and construction of the federal constitution as it applies to similar state statutes. See *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 296 (1998); *Fuller v. Oregon*, 417 U.S. 40, 42 (1974).

The need for this Court's guidance is even more evident when one considers the various federal courts'

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[2] Many other states have recently addressed the availability of jury trial rights under their state statutes. See *Franklin Lodge of Elks v. Marcoux*, 825 A.2d 480, 489 (N.H. 2003) (merits of constitutional argument asserting a jury trial right not reached because issue was not presented below, statute subsequently amended to permit jury trial by both parties); *Bishop Coal Co. v. Slayers*, 380 S.E.2d 238, 246 (W.Va. 1989) (relying upon Seventh Amendment analysis and state constitutional provision, state human rights commission award of money other than limited incidental damages without a jury held unconstitutional); *Kentucky Human Rights Comm'n v. Fraser*, 625 S.W.2d 852, 854 (Ky. 1981) (guided by Seventh Amendment and state constitutional case law, court found no jury trial right because not recognized as existing in common law at adoption of state constitution); and *Continental Title Co. v. District Court In and For City and County of Denver*, 645 P.2d 1310, 1316-17 (Colo. 1982) (no jury trial right under state anti-discrimination statute where back pay considered integral part of equitable relief).

interpretations recognizing jury trial rights under various States' discrimination statutes. Several federal courts have recognized the right to a jury trial of claims pursuant to various state discrimination statutes under the Seventh Amendment of the United States Constitution. *Gallagher v. Wilton Enters., Inc.*, 962 F.2d 120, 123-24 (1st Cir. 1992) (Seventh Amendment requires jury trial of claims under Massachusetts Fair Employment Practices Act); and *Gipson v. KAS Snacktime Co.*, 83 F.3d 225, 230 (8th Cir. 1996) (Missouri Human Right Act claims subject to a jury trial pursuant to Seventh Amendment).

Indeed, employers accused of federal discrimination claims may have no effective remedy to elect a jury trial if the state statute traps employers in the administrative agency even though federal statutes afford employers a right to a jury trial.[3] Employees with state claims of employment discrimination often assert analogous federal claims and regional Equal Employment Opportunity Commission offices devolve initial investigation to the state agencies. If an employee chooses to remain in the state administrative agency, employers are thereby prohibited from exercising their fundamental jury trial right in federal anti-discrimination claims. This Court must ensure uniformity of interpretation and construction of the federal constitution as it applies to similar states' statutes. Absent such uniformity, employers effectively have a fundamental right without a remedy to elect that right.

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[3] For example, the Civil Rights Act of 1991, 42 U.S.C. § 1981a(c)(i) provides a right to a jury trial under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(i); for age claims under the Age Discrimination and Employment Act, 29 U.S.C. § 623(a)(i); and disability claims under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(a).

II. Permitting Employees, But Not Employers, To Remove Claims Of Discrimination To Court For A Jury Trial Violates The Equal Protection Clause Of The Federal Constitution

The equal protection issue in this case is succinctly described in the vigorous dissent by Justice Cowin as follows:

> [O]verruling *Lavelle* while preserving *Dalis* creates an unconstitutional asymmetry that empowers plaintiffs unilaterally to extinguish respondents' access to a jury trial merely by choosing under which section of [Mass. Gen. Laws ch. 151B] to proceed.

A. 51a. The dissent further notes that since parties to employment discrimination cases are entitled to a trial by jury under art. 15 of the Massachusetts Declaration of Rights, "simple fairness" dictates that such a right be extended to all parties, including employers. A. 56a.

The Supreme Judicial Court reached the correct conclusion in *Lavelle* when it extended jury trial rights to employers based upon Fourteenth Amendment guarantees. The *Lavelle* court held that because the right to a jury trial is a state constitutionally guaranteed right, employers were denied federal equal protection of the law by virtue of their inability under ch. 151B to opt-out of proceedings in the state administrative agency and to obtain a jury trial on claims against them seeking legal relief. A. 108a. Mass. Gen. Laws ch. 151B, § 9 allows only employees to remove the claim to Superior Court, thereby giving unilateral control to employees over whether a jury

trial right will be available in any particular case and depriving employers of any such right.

The decision below posits that the distinction between procedures afforded by section 5 and section 9 of ch. 151B satisfies the equal protection dilemma. See A. 16-17a.[4] In doing so, however, the court relied upon *Panama R.R. v. Johnson*, 264 U.S. 375, 392-93 (1924) which is inapposite even if, for the sake of argument, jury trial rights with respect to civil administrative proceedings under § 5 can be considered separately.[5] The decision below, having imbued the distinction between section 5 and section 9 rights with constitutional significance, should not have circumvented the implications of that logic with respect to the legislative scheme that establishes "private actions" by applying *Panama R.R.* as if the employer or the employee in that case had a jury trial right to begin with.

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[4] The decision below relied upon an earlier decision, *New York & Massachusetts Motor Serv., Inc. v. Massachusetts Comm'n Against Discrimination*, 401 Mass. 566 (1988) ("*Motor Services*"). That case involved federal equal protection analysis, but did not consider whether recognizing a fundamental right to a jury trial in ch. 151B controversies would alter that analysis. See *Id.* at 580-81. Significantly, *Motor Services* predated the determination that art. 15's guarantee of a jury trial applies to employment discrimination cases, and the case was decided without any acknowledgment of that possibility. As such, *Motor Services* was in no position to consider the full implications of the choice between the section 5 and 9 remedies for violations of section 4 of ch. 151B, and the court there did not attempt to equate judicial review under Mass. Gen. Laws ch. 30A, § 14, with a trial on the merits by a jury of peers.

[5] In the dissent, Justice Cowin correctly observes that *Panama Railroad* is inapposite because that case did not allow one side of a legal dispute unilaterally to deprive the opponent of a fundamental right, "the Johnson Court [ ] addressed the right of injured seamen to elect alternative measures of redress, but not the substance of the 'measure of redress or either form of action.'" A. 54a, quoting *Panama Railroad*, 264 U.S at 392-93.

Accordingly, because this case raises issues involving a fundamental right guaranteed by the federal Equal Protection Clause, a right that is the cornerstone of our judicial system, this Court should exercise its discretion and grant the Petitioners' writ of certiorari.

III. The Federal Question Is Properly Presented

Although the court below states that its earlier holding in *Lavelle* was not required "as a matter of State constitutional law," A. 5a, without making express reference to the United States Constitution, the federal question in this case is properly presented.

First and most fundamentally, even though the court referred expressly only to "state" constitutional requirements, the plain and undeniable fact is that the decision below reversed the court's prior holding in *Lavelle*, a holding that was expressly and exclusively based upon the equal protection guarantee of the Fourteenth Amendment. A. 106a. In reversing *Lavelle's* earlier holding that employers have a *federal equal protection right* to remove and claim a jury trial, the court below necessarily held that employers do *not* have such a federal equal protection right. See A. 59a.

Second, despite its purported reliance upon state constitutional law only, the court's rationale is so interrelated with and influenced by federal law principles of equal protection that the court's decision necessarily brings a federal dimension to the its ruling. See *Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 150, 152 (1984).

Finally, Petitioners took extra steps to preserve the federal issue by filing a petition for rehearing specifically addressed to the federal equal protection

rights of employers. A. 59a. In this regard, it is noteworthy that prior to issuing the decision below, the Supreme Judicial Court had asked for briefing on whether *Dalis* should be overruled, but it had not asked for briefing on whether *Lavelle* should be overruled. See *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 85-86 n.9 (1980) (federal claims adequately presented even though not raised in lower state court when highest state court renders an unexpected interpretation of law or reverses its prior decision). Prior to the decision below, the Supreme Judicial Court had expressly followed *Lavelle* on numerous occasions. Indeed, as recently as June 2000, the Supreme Judicial Court noted that the right to a jury trial was "well developed" and that the decision in *Lavelle* "was the inevitable jurisprudential step that followed *Dalis*." *Wynn & Wynn P.C. v. Mass. Comm'n Against Discrimination*, 431 Mass 655, 663-64 (2000).

Petitioners, therefore, could not have reasonably expected that the validity of the federal constitutional basis for *Lavelle* would be questioned. As such, Petitioners seized the first opportunity to address the federal question in a petition for rehearing which the court summarily denied. See *Great Northern R.R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 366-67 (1932) (jurisdiction even though petition for rehearing summarily denied without reference to federal question). In the petition for rehearing, Petitioners argued that since *Lavelle* was correct to hold that employers have *Fourteenth Amendment* rights to remove ch. 151B claims to Superior Court and, thus, to elect a jury trial, the decision below, in reversing *Lavelle*, necessarily held that employers have no such Fourteenth Amendment rights, at least implicitly and

certainly erroneously. See A. 59a. There was no failure to preserve this issue for this Court's review. [6]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: September 1, 2004

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[6] *Stonehill* is both final and not susceptible to further review, making it ripe for review by this Court. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975); *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 163 (1973).

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APPENDIX A

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STONEHILL COLLEGE *vs.* MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION & another.[1]
WILFERT BROTHERS REALTY CO. *vs.* MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION & another.[2]
KEYLAND CORPORATION & another[3] *vs.* MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION & another.[4]
MASSACHUSETTS BAY TRANSPORTATION AUTHORITY *vs.* MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION & another.[5]

Bristol. Middlesex. Dukes. Suffolk. February 3, 2004. – May 6, 2004.

Present: MARSHALL, C.J., GREANEY, IRELAND, SPINA, COWIN, SOSMAN, & CORDY, JJ.

Massachusetts Commission Against Discrimination. Anti-Discrimination Law, Employment, Race, Handicap, Sex, Termination of employment. *Employment,* Discrimination, Retaliation, Sexual harassment, Termination. *Civil Rights,* Termination of employment. *Practice, Civil,* Jury trial. *Constitutional Law,* Jury, Equal protection of laws, Retroactivity of judicial holding. *Jury and Jurors. Common Law. Emotional Distress. Damages,* Emotional distress.

This court affirmed the correctness of its holding in *Dalis* v. *Buyer Advertising, Inc.*, 418 Mass. 220 (1994), that art. 15 of the Massachusetts Declaration of Rights entitles plaintiffs with sex

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[1] Soo Tang Tan.
[2] David Keeling.
[3] John Kheary.
[4] Brenda Raffurty.
[5] Geraldine Ross.

discrimination in employment claims filed in the Superior Court pursuant to G.L. c. 151B, § 9, to a trial by jury. [559-561]

This court concluded that respondents who have been determined by the Massachusetts Commission Against Discrimination in an administrative proceeding under G.L. c. 151B, § 5, to have committed discriminatory acts in employment are entitled to administrative review, under G.L. c. 30A, of that decision only, overruling in part the decision in *Lavelle* v. *Massachusetts Commission Against Discrimination*, 426 Mass. 332 (1997), that such respondents are entitled to a jury trial de novo on the discrimination claims asserted against them. [561-570] SOSMAN, J. concurring. COWIN, J. dissenting.

This court declined to overrule case law allowing emotional distress damages to be awarded in employment discrimination cases and other employment cases before the Massachusetts Commission Against Discrimination [570-575], but announced that a finding of discrimination or retaliation, by itself, would no longer be sufficient to permit an inference of, or a presumption of, emotional distress [575-577].

CIVIL ACTION commenced in the Superior Court Department on November 27, 2002.

A motion to dismiss was heard by *David A. McLaughlin, J.*

A proceeding for interlocutory review was heard in the Appeals Court by *Charlotte A. Perretta*, J. The Supreme Judicial Court granted an application for direct appellate review.

CIVIL ACTIONS commenced in the Superior Court Department on February 27, April 9, and June 25, 2002, respectively.

Questions of law were reported by *Peter W. Agnes, Jr., Charles T. Spurlock, J.*, and *Margaret R. Hinkle*, J.

The Supreme Judicial Court granted requests for direct review.

M. Robert Dushman for Stonehill College.

Robert L. Quinan, Jr., Assistant Attorney General, & *Beverly I. Ward* & *Steven S. Locke* (*Wendy A. Cassidy, J. Lynn Milinazzo-Gaudet, & Simone R. Liebman* with them) for Massachusetts Commission Against Discrimination.

Nancy S. Shilepsky (*Patricia A. Washienko* with her) for Soo Tang Tan.

Robert S. Mantell for David Keeling & another.

Albert F. Cullen, Jr., for Wilfert Brothers Realty Company.

Amy L. Hanson (*James F. Rogers, II*, with her) for Brenda Raffurty.

Bernard J. Hamill (*David A. Robinson* with him) for Keyland Corporation & another.

Walter M. Foster (*Sarah E. Lent* with him) for Massachusetts Bay Transportation Authority.

The following submitted briefs for amici curiae:

Christine Hughes, Arthur G. Telegen, Anjali Parekh Prakash, Richard L. Alfred, Sally L. Adams, & James M. Paulson for New England Legal Foundation & others.

Joel P. Suttenberg for Jewish Alliance for Law and Social Action.

James S. Weliky, Laura M. Unflat, & Robert S. Mantell for Massachusetts Employment Lawyers Association.

Anne L. Josephson, Sarah Wunsch, Ellen J. Zucker, Nadine Cohen, & James S. Weliky for American Civil Liberties Union of Massachusetts & others.

Thomas F. Reilly, Attorney General, & *John E. Bowman, Jr.*, Assistant Attorney General, for the Attorney General.

David A. Robinson for town of Agawam.

Martin J. Rooney for Acushnet Housing Authority & others.

GREANEY, J. These cases arise under G. L. c. 151B. In each case, the Massachusetts Commission Against Discrimination (MCAD or commission) entered decisions finding the respondents liable for employment discrimination and awarded relief including damages for emotional distress. The respondents have sought judicial review of the MCAD's decision pursuant to G. L. c. 151B, § 6, in accordance with standards set forth in G. L. c. 30A, § 14, and also have sought jury trials in the Superior Court, pursuant to this court's decision in *Lavelle* v. *Massachusetts Comm'n Against Discrimination*, 426 Mass. 332 (1997) (*Lavelle*). In three of the cases, a judge in the Superior Court reported a question or questions, seeking clarification of various procedural and evidentiary issues relating to the respondents' requests for jury trials. In the fourth case (Stonehill College *vs.* Massachusetts Comm'n Against Discrimination), the respondent appeals from an order by a judge in the Superior Court directing it to elect either judicial review under G. L. c. 30A of the MCAD decision, or a jury trial pursuant to *Lavelle*, thus denying the respondent's right to have both. We granted applications for direct appellate review and invited interested parties to submit briefs concerning an issue not raised by the parties below, the correctness of this court's holding in *Dalis* v. *Buyer Advertising, Inc.*, 418 Mass. 220, 223 (1994) (*Dalis*), that art. 15 of the Declaration of Rights of the Massachusetts Constitution entitles plaintiffs with sex discrimination claims filed in the Superior Court pursuant to G. L. c. 151B, § 9, to a trial by jury. Necessarily contained in that request was a corollary issue calling for the parties and interested parties also to express views on the subsequent extension of the *Dalis* holding, in *Lavelle, supra*, to respondents in administrative proceedings before the MCAD pursuant to G. L. c. 151B, § 5 (§ 5 proceedings).

We conclude that *Dalis* was correctly decided. We further conclude that the *Dalis* decision does not require, as matter of State constitutional law, the result reached by this court in *Lavelle*. That result is problematic, and, for reasons set forth in this opinion, we conclude that *Lavelle* must be overruled in part. Accordingly, as of the date of this opinion, respondents who have been determined by the commission in § 5 proceedings to have committed discriminatory acts in employment in violation of G. L. c. 151B are entitled to administrative review, under G. L. c. 30A, of that decision only. We also conclude that emotional distress damages should continue to be awarded by the MCAD in appropriate cases and comment on various factors that govern such awards.

Stonehill College *vs.* Massachusetts Commission Against Discrimination.

On April 27, 1995, Soo Tang Tan, a professor of mathematics at Stonehill College (Stonehill) filed a complaint with the MCAD charging Stonehill with unlawful discrimination based on his race and color in violation of G. L. c. 151B, § 4 (1). After a public hearing, an MCAD hearing officer determined that Stonehill had discriminated against Soo Tang Tan in violation of G. L. c. 151B, and awarded him back pay, front pay, and $150,000 in damages for emotional distress. The commission affirmed the hearing officer's decision in all respects. Stonehill then filed a complaint in the Superior Court seeking judicial review of the MCAD decision and, should its administrative appeal be unsuccessful, a jury trial de novo on the discrimination complaint. A Superior Court judge denied Soo Tang Tan's motion to dismiss the latter but ordered Stonehill to file an election within thirty days as to its chosen avenue of relief. The judge reasoned that a respondent appealing from an unfavorable MCAD decision is entitled to an

administrative appeal or a jury trial de novo, but not both. A single justice of the Appeals Court granted Stonehill leave to pursue an interlocutory appeal of the judge's order, and this court allowed Stonehill's application for direct appellate review.

Wilfert Brothers Realty Co. *vs.* Massachusetts Commission Against Discrimination.

On January 20, 1993, David Keeling filed a complaint with the MCAD alleging that he was unlawfully terminated by Wilfert Brothers Realty Co. (Wilfert Brothers) after incurring a knee injury during the course of his employment. After a public hearing, an MCAD hearing commissioner entered a decision finding Wilfert Brothers liable for handicap discrimination in violation of G. L. c. 151B, § 4. The commission ordered Wilfert Brothers to pay Keeling lost wages and $35,000 in emotional distress damages.[6] Wilfert Brothers filed a petition for review of the MCAD decision by the full commission and, at the same time, served notice to the MCAD and to Keeling of its intention to seek a jury trial. The MCAD decision was affirmed by the full commission.[7] Wilfert Brothers then filed a complaint in the Superior Court, requesting judicial review of the final decision and order of the MCAD, or, alternatively, requesting a jury trial on Keeling's claims of discrimination. A judge in the Superior Court denied motions filed by the commission and Keeling to dismiss (or strike) the claim for a jury trial and reported to the Appeals Court

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[6] Other relief awarded by the Massachusetts Commission Against Discrimination (MCAD or commission) against Wilfert Brothers Realty Co. were orders to cease and desist handicap discrimination in the workplace and to submit a plan for antidiscrimination training for its employees.

[7] In addition to the relief ordered by the hearing commissioner, the full commission awarded Keeling attorney's fees and costs.

the question set forth below.[8] This court allowed Keeling's application for direct appellate review.

Keyland Corporation *vs.* Massachusetts Commission Against Discrimination.

On November 29, 1994, Brenda Raffurty filed a claim with the MCAD asserting that Keyland Corporation and John Kheary (together, Keyland) subjected her to sexual harassment in the workplace in violation of G. L. c. 151B. After a public hearing, an MCAD hearing commissioner entered a decision in favor of Raffurty. Orders entered against Keyland included an order to pay Raffurty $100,000 in emotional distress damages. Keyland filed a petition for review by the full commission and notified the commission and Raffurty of its intention to seek a jury trial. The full commission affirmed the hearing commissioner's decision. Keyland then filed a complaint in the Superior Court seeking both judicial review and a jury trial de novo on Raffurty's discrimination claims. At a hearing on the MCAD's motion that Keyland must elect either judicial review or a jury trial, Keyland assented to the dismissal of its claim for judicial review. Subsequent motions and hearings followed on issues relating to MCAD's standing to participate in the case as a party defendant. In a memorandum of decision and order, the motion judge addressed numerous procedural issues raised in the case and ordered that the trial would be conducted de novo, with the burden on Raffurty to establish discriminatory conduct on the part of Keyland and Kheary. The judge further ruled that the decision of the MCAD would be inadmissible

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[8] "Did Wilfert Brothers Realty Co. waive its right to a jury trial by not asserting its claim until after the decision of the MCAD hearing officer, but before the Full Commission affirmed that decision, when the decision was issued more than three years after the claim arose?"

as prima facie evidence of discrimination in the proceedings before the jury and that the MCAD would not be allowed to intervene as a party in the case. The judge then reported the correctness of his decision to the Appeals Court,[9] and we granted Raffurty and the commission's application for direct appellate review.

Massachusetts Bay Transportation Authority *vs.* Massachusetts Commission Against Discrimination

On May 2, 1994, Geraldine Ross filed a claim with the MCAD alleging discrimination on the part of her employer, the Massachusetts Bay Transportation Authority (MBTA), in violation of G. L. c. 151B, § 4 (16) (handicap).[10] After a public hearing, a MCAD hearing officer entered a decision finding that the MBTA had failed reasonably to accommodate Ross and,

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[9] The questions reported are as follows:

> "1. Did Kheary and Keyland waive their right to a jury trial by not asserting their claim until after the decision of the MCAD Hearing Officer, but before the Full Commission affirmed that decision, when the decision was issued more than three years after the claim arose?
>
> "2. If Kheary and Keyland did not waive their right to a jury trial, is the trial *de novo*? Specifically:
>
> "a) Does the defendant (the complainant in [the] previous MCAD hearing) have the burden of proof?
>
> "b) Is the MCAD's decision admissible?
>
> "c) Is discovery warranted?
>
> "d) Does the MCAD have a right to intervene?"

[10] The original complaint filed with the MCAD alleged that Ross had been denied the opportunity to obtain a full-time position as a fare collector on the basis of her sex (female) and her race and color (African American). The complaint later was amended, by the MCAD investigating commissioner, to include the claim of handicap discrimination, and Ross withdrew her claims of sex and race discrimination at the time of the public hearing on her claims.

moreover, that the MBTA's policy of "denying part-time injured surface line employees the right to ever become full time employees" arbitrarily discriminated against an entire category of disabled employees. The decision was affirmed by the full commission and the MBTA was ordered to pay Ross lost wages and emotional distress damages in the amount of $50,000. The MBTA filed a complaint in the Superior Court, seeking judicial review of the commission's decision and asserting its right to a jury trial. A judge in the Superior Court concluded that the MBTA, as a governmental entity, is not entitled to a trial by jury under either art. 15 or the *Lavelle* decision and dismissed that claim. Recognizing that the issue was one of substantial importance, the judge reported the question: "In a proceeding under G. L. c. 151B, does a governmental respondent like the MBTA have a right to trial by jury when the complainant does not elect a judicial determination of her claim?"[11] We granted the MBTA's application for direct appellate review.

1. It will be useful to furnish some legal background. In *Dalis*, this court held that art. 15 protects a plaintiff's right to a trial by jury on a claim of employment discrimination based on sex.[12] This principle was extended to claims of handicap

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[11] This court noted, in *Lavelle* v. *Massachusetts Comm'n Against Discrimination*, 426 Mass. 332, 337 n.8 (1997), that "[a] governmental respondent's right to a jury trial, if any, has implicitly been waived in G. L. c. 151B, at least where a complainant does not elect a judicial determination of her claim." The intended scope of this comment has been the focal issue of the parties in the above case and the subject of numerous briefs of amici, arguing, on either side, that governmental entities who are respondents in a § 5 proceeding before the MCAD are, or are not, entitled to have a jury decide the claims against them.

[12] The court further held that the plaintiff was entitled to a jury trial on her other allegations of violations of G. L. c. 93, § 102 (equal rights act), and G. L. c. 149, §§ 105A-105C (wage discrimination based on gender), and § 105D (maternity leave act). See *Dalis* v. *Buyer Advertising, Inc.*, 418 Mass. 220, 226-228 (1994).

discrimination in *Whalen* v. *NYNEX Info. Resources Co.*, 419 Mass. 792, 795 (1995), and to all damage claims under G. L. c. 151B, § 4, in *MacCormack* v. *Boston Edison Co.*, 423 Mass. 652, 655 (1996). The plaintiff in *Dalis* filed suit in the Superior Court, pursuant to G. L. c. 151B, § 9, claiming that her employer had discharged her because she had become pregnant and demanding a jury trial. This court recognized that the plaintiff's sex discrimination claim was a "suit between two persons which clearly set[] forth a controversy concerning property" and, thus, fell "squarely within the language of art. 15." *Id.* at 223. The court determined that the plaintiff's claim was not within art. 15's exception for claims that had been addressed by the court's equity jurisdiction, as it existed in 1780, in either subject matter or the nature of the remedy sought, and, instead, analogized the claim "to common law actions sounding in both tort and contract." *Id.*, citing *Gallagher* v. *Wilton Enters., Inc.*, 962 F.2d 120, 122-123 (1st Cir. 1992).

Four years after *Dalis*, a respondent named in a complaint of sex discrimination filed with the MCAD (Lavelle) brought an action in the Superior Court, asserting that, based on the principles stated in *Dalis*, and on principles of equal protection, he likewise was entitled to a jury trial. See *Lavelle, supra* at 333. A judge in the Superior Court dismissed the complaint as premature, on the ground that *Lavelle* had not exhausted his rights before the commission. On appeal, however, this court considered the merits of Lavelle's claim and concluded that "[t]he reasoning of this court in its *Dalis* opinion identifying the constitutional right of a complainant to have a trial by jury applies equally to a respondent such as Lavelle. If one side to a dispute has a constitutional right to a jury trial, generally the other side must have a similar right." *Id.* at 337.

Having perceived an equal protection infirmity in G. L. c. 151B, the *Lavelle* court emphasized the

importance of deference to the statutory scheme established in G. L. c. 151B, which vests substantial authority in the commission to decide complaints and pointedly does not allow a respondent to avoid a full administrative proceeding by removing a case to the Superior Court. Accordingly, the court fashioned a remedy that expanded the removal rights afforded complainants in § 9 to respondents — albeit postponed until after the full MCAD proceedings had ended — "until the Legislature, if it elects to do so, provides another solution." *Id.* at 338. The court stated:

> "A right in a respondent to obtain a jury trial only after the commission has taken final action is the best available option. In this way the commission will be involved in the matter as fully as possible and as the Legislature directed. Many disputes will be settled by the commission and will not need to be adjudicated. Persons representing themselves will not be forced into unfamiliar court surroundings but will be heard instead in less intimidating agency proceedings. Courts, in turn, will not be unnecessarily inundated with gender-based discrimination lawsuits demanded by respondents, perhaps in some instances for tactical reasons. Also, the commission may decide in favor of the respondents on the merits, thereby ending the matter. G. L. c. 151B, § 9, first par. Moreover, although the commission may decide in favor of the complainant, it might only grant traditional equitable relief. In such a case, a respondent would have no right to a jury trial. Additionally, an unsuccessful respondent may conclude that an appeal based on the agency record (G. L. c. 151B, § 6) provides an adequate avenue of relief from the agency decision. We adopt this

> solution recognizing that it gives certain respondents two chances to prevail, before the commission and then in court, while a complainant unsuccessful before the commission may not proceed to court for a new hearing (G. L. c. 151B, § 9, first par.), but may seek judicial review only on the agency record (G. L. c. 151B, § 6). We also recognize that there will be practical problems in extending a jury trial right to a respondent, including the preparation of a complaint to be filed in court by or on behalf of a complainant. Other questions may arise concerning the process we have described, but we decline to anticipate and answer them now."[13]

Id. at 338-339.

None of the complainants in the four cases under review elected to bring a private action under G. L. c. 151B, § 9. In each case, after a full § 5 administrative proceeding, the commission has determined that the respondent engaged in unlawful discriminatory employment practices. Various remedial orders, including orders for the payment of damages for emotional distress, have been entered against each respondent. The respondents have each filed a complaint in the Superior Court seeking to have the commission's decision overturned or, alternatively, seeking a jury trial de novo. Although each case presents unique issues relative to the respondents'

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[13] The *Lavelle* decision did not decide at what point in the MCAD proceedings a respondent should assert its intention to request a jury trial but suggested the possibility that "to avoid a claim of waiver, [Lavelle] must assert [his right to a jury trial] before the commission holds a hearing on the complaint, perhaps at the same point in the proceedings that G. L. c. 151B, § 9, permits a complainant to elect a judicial, rather than a commission, determination of the complaint." *Lavelle, supra* at 335.

asserted rights to a jury trial,[14] together the cases call into question the validity of *Dalis*, and the determination in *Lavelle* that a respondent in a G. L. c. 151B employment case has a right to a jury trial. Before deciding the specific points of law raised in each case, we first consider whether a respondent who, after a full administrative proceeding has been determined to have violated the provisions of G. L. c. 151B prohibiting discrimination in employment, should be entitled to set aside the MCAD decision and orders entered against them and have the same claims decided by a jury in the Superior Court. The position of the respondents on this issue is, essentially, identical: *Dalis* and *Lavelle* were correctly decided, and the principles established therein entitle each respondent to a jury trial de novo on the discrimination claims asserted against them. The position taken by the four complainants and by the MCAD on this issue is that *Dalis* was correctly decided and *Lavelle* is incorrect and must be overruled in part.

2. There is no flaw in the reasoning or conclusion in *Dalis*. Article 15 "preserves 'the common law trial by jury in its indispensable characteristics as established and known at the time the Constitution was adopted' in 1780." *Department of Revenue* v. *Jarvenpaa*, 404 Mass. 177, 185-186 (1989), quoting *Opinion of the Justices*, 237 Mass. 591, 596 (1921). "The common law to which the Justices were referring in their 1921 opinion was not only the common law (judge-made

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[14] One common issue raised in each case below is whether the respondents, by waiting to request a jury trial until after the public hearing and the entry of the commission's decision in favor of the complainant, have waived their asserted rights to a jury trial. See note 13, *supra*. See also note 23, *infra*. The commission subsequently addressed this issue by regulation, see 804 Code Mass. Regs. § 1.20 (5) (1999) (providing that the right to jury trial must be preserved "in writing, and provided to the Commission and the Complainant within 30 days after Certification to Public Hearing"), which did not become effective until January 1, 1999, and so does not apply to the four respondents before us.

law) of England but also, in general, the English statutes in force at the time of emigration, certain other English statutes and 'ancient usages.' *Commonwealth* v. *Knowlton*, 2 Mass. 530, 534-535 (1807)." *Department of Revenue* v. *Jarvenpaa, supra* at 186.

Independent research indicates that, from the late 1700's until midway through the 1800's, common law in both England and the American States provided for an employee's cause of action against an employer for wrongful discharge or breach of employment contract.[15] See Feinman, The Development of the Employment at Will Rule, 20 Am. J. Legal Hist. 118, 118 (1976). In the 1797 Massachusetts case of White vs. Currier, 5 Dane's Abr. 110 (1824), for example, an employee who argued "he was prevented by the act of God from fulfilling his [employment] contract" was awarded the sum of twenty-eight dollars as quantum meruit payment from his employer for four months of labor. These causes of action were commonly tried before a jury. See also, e.g., *Tufts v. Plymouth Gold Mining Co.*, 14 Allen 407, 412 (1867); *Revere* v. *Boston Copper Co.*, 15 Pick. 351 (1834).

Although a violation of G. L. c. 151B is not a tort, we have, on many occasions, identified tort-like aspects of a G. L. c. 151B discrimination claim

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[15] As the Supreme Court of Connecticut observed in *Magnan* v. *Anaconda Indus., Inc.*, 193 Conn. 558, 561-562 (1984):

> "In the sixteenth century a statute enacted in England prohibited an employer from discharging an employee 'unless it be for some reasonable and sufficient cause of matter . . . .' Statute of Labourers, 5 Eliz. C. 4 (1562), reprinted in 6 Pickering's Statutes 159-60 (1763). Although the statute was eventually repealed, English courts continued to hold that a contract of employment for an indefinite duration was presumptively for a term of one year; see 1 Blackstone, Commentaries 335 (1832); 25 Halsbury's Laws of England 480-81 (3d Ed. 1958); and permitted the employee to maintain a cause of action for breach of the employment contract."

brought in the Superior Court. See, e.g., *Thomas* v. *EDI Specialists, Inc.*, 437 Mass. 536, 539 (2002); *Conway* v. *Electro Switch Corp.*, 402 Mass. 385, 387 (1988). The Supreme Court of the United States has recognized that "[a]n action to redress racial (or gender) discrimination may . . . be likened to an action for defamation or intentional infliction of mental distress." *Dalis, supra* at 224, quoting *Curtis* v. *Loether*, 415 U.S. 189, 195-196 n.10 (1974). Following the Supreme Court's lead, Federal courts have analogized wrongful discharge and employment discrimination cases to common law wrongful discharge actions. See *Lebow* v. *American Trans Air, Inc.*, 86 F.3d 661, 668-669 (7th Cir. 1996); *Waldrop* v. *Southern Co. Servs.*, 24 F.3d 152, 156 (11th Cir. 1994); *Pandazides* v. *Virginia Bd. of Educ.*, 13 F.3d 823, 829 (4th Cir. 1994); *Gallagher* v. *Wilton Enters., Inc.*, 962 F.2d 120, 122-123 (1st Cir. 1992); *Smith* v. *Barton*, 914 F.2d 1330, 1337 (9th Cir. 1990), cert. denied, 501 U.S. 1217 (1991).

In addition to the legal nature of the plaintiff's claim in Dalis, the remedies sought in the case (compensatory and exemplary damages, interest and costs, and attorney's fees) were predominantly legal rather than equitable in nature. See *Conway* v. *Electro Switch Corp., supra* (recognizing that, implicit in language of § 9 allowing "civil action for damages or injunctive relief, or both," was "a plain legislative intent to afford victims of discrimination the legal remedy of compensatory damages"). We note that the right to seek punitive damages, granted to complainants, like Dalis, who choose to pursue their claim under G. L. c. 151B, § 9, "traditionally [has] been viewed as a legal remedy that must be imposed by a jury." *Lebow* v. *American Trans Air, Inc., supra* at 669. That G. L. c. 151B, § 9, also allows a plaintiff to seek injunctive relief as well as damages, "thus mixing a traditionally equitable remedy with a traditionally legal remedy, 'may not compromise [the] constitutional

right to a trial by jury.'" *Rosati* v. *Boston Pipe Covering, Inc.*, 434 Mass. 349, 352 (2001), quoting *Dalis, supra* at 227 (in context of G. L. c. 149, § 27). Indeed it is hardly controversial that art. 15 guarantees plaintiffs who pursue discrimination claims in the Superior Court the right to have their claims decided by a jury.[16] See *Gallagher* v. *Wilton Enters., Inc., supra* at 124 ("*Conway* [v. *Electro Switch Corp., supra,*] constitutes an authoritative basis for concluding that [actions under G. L. c. 151B, § 9, are] analogous to an eighteenth-century legal cause of action providing legal remedies"). Indeed, no party in any of the four cases under review asserts otherwise.

3. We now confront the main holding in *Lavelle*. The decision, in most of its aspects, reaffirms *Dalis* and much of what was said in *Lavelle* with respect to *Dalis* is correct. Based on arguments now made by the parties, and not made in *Lavelle*, however, we conclude that *Lavelle* incorrectly applied the holding in *Dalis* by mistakenly assuming that G. L. c. 151B procedures under § 5 and § 9, are, essentially, the

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[16] Arguments presented in the concurring and dissenting opinions suggest that the holding in *Dalis, supra* at 223, discussed above, cannot be reconciled with our earlier decision in *Nei* v. *Burley*, 388 Mass. 307, 315 (1983), in which we concluded that claims under G. L. c. 93A are primarily equitable and do *not* give rise to an art. 15 right. In both decisions, this court employed the traditional methodology for determining a constitutional entitlement to a jury trial, namely, by asking whether the claims at issue are analogous to historical common-law causes of action. See *Dalis*, supra at 221-225; *Nei* v. *Burley, supra* at 313-315. Our decision in *Nei* is not part of this case and, as indicated above, no party in this case submits that *Dalis* was wrongly decided. Analysis of inconsistencies in the court's reasoning in *Dalis* and in *Nei*, therefore, should wait for another day. It should be noted, however, that the decision whether a new statutory cause of action meets the test fashioned to determine the right to a jury trial under art. 15, is not one that can be made with scientific certitude. Rather, the decision directs an inquiry that examines historical antecedents as reasonably viewed in a contemporary setting with attention to the preference, in most instances, for the grant of a jury trial.

same. Based on that erroneous assumption, the *Lavelle* court reasoned that respondents in a § 5 administrative proceeding are similarly situated, with respect to art. 15, as plaintiffs in a § 9 action in the Superior Court, and so concluded that to deny such respondents the right to a jury trial would be to deny them equal protection under the law.

Adherence to the principle of stare decisis provides continuity and predictability in the law, but the principle is not absolute. No court is infallible, and this court is not barred from departing from previous pronouncements if the benefits of so doing outweigh the values underlying stare decisis. See *Franklin* v. *Albert*, 381 Mass. 611, 617 (1980); *Lewis* v. *Lewis*, 370 Mass. 619, 628-629 (1976). After reflection, we conclude that the constitutional analysis set forth in *Dalis* does not apply to parties in a § 5 proceeding. The *Lavelle* court's pronouncement to the contrary circumvents the comprehensive scheme set out by the Legislature for the resolution of discrimination claims and (unintentionally) undermines the commission's authority to fulfil its mandate of protecting citizens of the Commonwealth from discriminatory employment decisions and punishing unlawful discrimination in the workplace. See *Knight* v. *Avon Prods., Inc.*, 438 Mass. 413, 424 n.6 (2003); *Fontaine* v. *Ebtec Corp.*, 415 Mass. 309, 322 (1993); *Lynn Teachers Union, Local 1037* v. *Massachusetts Comm'n Against Discrimination*, 406 Mass. 515, 523 (1990); *Rock* v. *Massachusetts Comm'n Against Discrimination*, 384 Mass. 198, 206 (1981). Accordingly, we conclude that the jury trial holding in *Lavelle* should be overruled.[17] Our reasons are as follows.

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[17] We acknowledge that in *Wynn & Wynn, P.C.* v. *Massachusetts Comm'n Against Discrimination*, 431 Mass. 655, 664 (2000), we spoke approvingly regarding *Lavelle*. Based on incorrect assumptions that have been identified above, the relevant portions of *Wynn & Wynn* are no longer to be considered the law.

(a) The discrimination claim considered in the *Dalis* case had been filed in the Superior Court pursuant to G. L. c. 151B, § 9. There was no suggestion by the *Dalis* court, nor did any party in that case argue, that the art. 15 analysis also would apply to discrimination claims heard in proceedings conducted entirely within the MCAD pursuant to G. L. c. 151B, § 5. The differences between administrative proceedings conducted pursuant to § 5, and a private right of action under § 9, are significant. We highlight but a few.

While the main object of a judicial proceeding under § 9 is to recover damages for the individual victim of unlawful discrimination, see *Conway* v. *Electro Switch Corp., supra* at 387, the primary purpose of an administrative proceeding before the MCAD is to vindicate the public's interest in reducing discrimination in the workplace by deterring, and punishing, instances of discrimination by employers against employees. See *Thomas* v. *EDI Specialists, Inc.*, 437 Mass. 536, 541-542 (2002); *College-Town, Div. of Interco, Inc.* v. *Massachusetts Comm'n Against Discrimination*, 400 Mass. 156, 170 (1987). The MCAD was established to enforce the Commonwealth's antidiscrimination laws. The complainant, thus, may be a party to a § 5 proceeding and may present testimony at the public hearing, but it is the MCAD, and not the complainant, that prosecutes the discrimination claim. See G. L. c. 151B, § 5. In direct contrast, the commission typically takes no further action once a complainant elects a judicial determination of a discrimination claim. A plaintiff in an action filed pursuant to § 9 seeks to recover damages to compensate for the injury done him, and, to that end, a successful plaintiff may be awarded actual and punitive damages. See G. L. c. 151B, § 9. While a successful complainant in an administrative proceeding may, in appropriate cases, be awarded damages for emotional distress, the commission is

empowered to fashion equitable remedies designed chiefly to protect and promote the broader public interest in eradicating systemic discrimination.[18] See, e.g., *Chief Justice for Admin. & Mgt. of the Trial Court* v. *Massachusetts Comm'n Against Discrimination*, 439 Mass. 729, 736-737 (2003). "The primary responsibility to determine the scope of [G. L. c. 151B] has been entrusted to the MCAD, not to the courts." *Rock* v. *Massachusetts Comm'n Against Discrimination*, *supra* at 206. See *Lynn Teachers Union, Local 1037* v. *Massachusetts Comm'n Against Discrimination*, *supra* at 523.

(b) The respondent in *Lavelle* (and the respondents in the four cases under review) was a party in an MCAD proceeding. The complainant in *Lavelle* (and the complainants in the four cases under review) chose not to proceed through the courts but opted instead for an administrative hearing and judicial review of the commission's decision on his claims. That the Legislature has provided complainants, and not respondents, the right to choose the forum in which their claim will be heard does not pose an equal protection problem.[19] This point was resolved by this

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[18] On a finding that a respondent has engaged in any unlawful practice under G. L. c. 151B, § 4, the commission "shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful practice . . . [and] to take such affirmative action, including but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, or restoration to membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purposes of this chapter." G. L. c. 151B, § 5. As of July 1, 2003, the commission also may impose civil administrative penalties, ranging from $10,000 to $50,000, depending on the number of discriminatory practices a respondent was adjudged to have committed in the past. See St. 2003, c. 26, §§ 438, 715.

[19] The forum selection issue is by no means the only asymmetrical provision of the statutory scheme. Section 5 directs the MCAD to assist complainants presenting a case (but not to help employers defend) and permits attorney's fees and costs to be awarded to successful complainants only. See *New York & Mass.*

court in *New York & Mass. Motor Serv., Inc.* v. *Massachusetts Comm'n Against Discrimination*, 401 Mass. 566 (1988).

In that case, we found no merit in the argument that the procedures outlined in §§ 5 and 9 deprived an employer of its fundamental right to a trial because a complainant may transfer the controversy to the Superior Court for a judicial adjudication of the discrimination claim while an employer may not. See *id.* at 580-581. Our reasoning was premised on the fact that, because, pursuant to § 6, all orders of the commission are subject to judicial review, the respondent in a claim of employment discrimination "is not faced with a denial of access to the judicial system, but rather with a postponement of judicial adjudication at the complainant's option until after the commission has issued a preliminary determination and ordered a remedy based on its findings of fact." *Id.* at 580. We concluded that "[a]ny effect on the rights or privileges of employers as a class is limited to the differences between initial judicial adjudication of a discrimination claim, and a claim that reaches the court after an administrative hearing and determination." *Id.*

(c) Nothing in *Dalis* questioned or altered the equal protection analysis set forth in the *New York & Mass. Motor Serv.* decision. The *Lavelle* court rested its decision on the fact that, since *Dalis*, the statute's "differing treatment of complainants and respondents," in cases where complainants opt to pursue their claims within § 5 proceedings, by default, extinguishes any corresponding right to a jury trial that would have been available to a respondent had the complainant chosen to pursue a private action in the Superior Court. *Lavelle, supra* at 337.

Motor Serv., Inc. v. *Massachusetts Comm'n Against Discrimination*, 401 Mass. 566, 580 n.13 (1988) (noting other contexts in which control over access to courts resides in one party).

We emphasize that G. L. c. 151B itself does not grant a complainant in an employment discrimination case the right to a jury trial. The statutory scheme merely grants an alleged victim of employment discrimination the threshold opportunity to choose one of "two largely independent avenues for redress of violations of [G. L. c. 151B], one through the MCAD (G. L. c. 151B, §§ 5-6), and the other in the courts (G. L. c. 151B, § 9)." *Brunson* v. *Wall*, 405 Mass. 446, 452 (1989), quoting *Christo* v. *Edward G. Boyle Ins. Agency, Inc.*, 402 Mass. 815, 817 (1988). It is reasonable, and constitutionally permissible, to provide a complainant with a choice of enforcement options. The United States Supreme Court has long recognized:

> "There are many instances in the law where a person entitled to sue may choose between alternative measures of redress and modes of enforcement; and this has been true since before the Constitution. But it never has been held, nor thought so far as we are advised, that to permit such a choice between alternatives otherwise admissible is a violation of due process of law. In the nature of things, the right to choose cannot be accorded to both parties, and, if accorded to either, should rest with the one seeking redress rather than the one from whom redress is sought.

Panama R.R. v. *Johnson*, 264 U.S. 375, 392-393 (1924).

This is the case even where, as here, one choice would allow the matter to be tried to a jury and one choice would not. See *Paro* v. *Longwood Hosp.*, 373 Mass. 645, 648-652 (1977) (no merit to challenge that screening procedure of medical malpractice tribunal statute, G. L. c. 231, § 60B, violates equal protection or art. 15). Should the complainant choose to remain

within the MCAD, then both parties are subject to the formal administrative process, and neither has a right to a jury trial. See *Doherty* v. *Retirement Bd. of Medford*, 425 Mass. 130, 137 (1997); *Zora* v. *State Ethics Comm'n*, 415 Mass. 640, 652 (1993). Alternatively, if the complainant chooses to bring her claim to the Superior Court, then either party may elect a jury trial under the express terms of Mass. R. Civ. P. 38 (b), 365 Mass. 800 (1974), and under case law applying art. 15.[20] See *Rosati* v. *Boston Pipe Covering, Inc.*, 434 Mass. 349, 351 (2001); *Farnham* v. *Lenox Motor Car Co.*, 229 Mass. 478, 481 (1918). Within either forum, then, both parties have identical art. 15 rights.

One observation is in order with respect to principles of equal protection. Following *Lavelle*, a respondent in a § 5 proceeding may wait until after an unfavorable MCAD decision to elect between judicial review pursuant to § 6 and a de novo jury trial on the merits. A complainant aggrieved with an MCAD decision, on the other hand, plainly has no corresponding strategic advantage. See *Brunson* v. *Wall, supra* at 452-453 (concluding that complainant who chose to pursue administrative remedy before MCAD cannot later invoke alternative remedy afforded by § 9). A persuasive argument, thus, could be advanced that *Lavelle*'s purported remedy for G. L. c. 151B's perceived constitutional infirmity violation has created an even more inequitable situation. Moreover, it departs from the Legislature's clear intent that both "parties would be bound by an MCAD decision, subject only to judicial review," *Brunson* v. *Wall, supra*

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[20] Section 9 actually authorizes a complainant to "bring a civil action for damages or injunctive relief or both in the superior or probate court" alleging injury from a practice unlawful under G. L. c. 151B. Indisputably, no constitutional right to a jury trial attaches in the Probate and Family Court. See *Edgar* v. *Edgar*, 403 Mass. 616, 618-619 (1988), S.C., 406 Mass. 628 (1990); *Fuller* v. *Sylvia*, 240 Mass. 49, 52-53 (1921).

at 452, and is at odds with the doctrine of collateral estoppel and "the strong and oft-stated public policy of limiting each litigant to one opportunity to try his case on the merits." *Id.* at 453, quoting *Haran* v. *Board of Registration in Med.*, 398 Mass. 571, 575 (1986). As recognized in *Lavelle, supra* at 338, the solution adopted by the *Lavelle* court "gives certain respondents two chances to prevail."

(d) The constitutional analysis in *Dalis* does not support the proposition that art. 15 rights vest whenever an allegation of a G. L. c. 151B employment violation is lodged with the MCAD, regardless of the forum in which the claim is to be tried. It is true that the language of art. 15 "sweeps broadly." *Dalis, supra* at 222. Formal proceedings conducted within the MCAD pursuant to § 5, however, are civil administrative proceedings, created by statute and of a type unknown at common law, initiated, directed, and limited by the commission, on behalf of the Commonwealth, against a named respondent. Unlike private actions pursuant to § 9, MCAD proceedings "do not involve a suit between two or more persons in the sense provided for by art. 15, nor do they involve a controversy concerning property as that phrase is used in art. 15." *Zora* v. *State Ethics Comm'n*, 415 Mass. 640, 652-653 (1993) (referring to proceedings to adjudicate civil violations of G. L. c. 268A). See *Doherty* v. *Retirement Bd. of Medford*, 425 Mass. 130, 137 (1997), quoting *Curtis* v. *Loether, supra* at 194 (art. 15 inapplicable to administrative proceedings because jury trials "incompatible with the whole concept of administrative adjudication").

On a finding of employment discrimination, the commission has broad authority to "take such affirmative action, *including but not limited to*, hiring, reinstatement or upgrading of employees, with or without back pay, or restoration to membership in any respondent labor organization, *as, in the judgment of the commission, will effectuate the purposes of this*

chapter" (emphasis supplied). G. L. c. 151B, § 5. In *Bournewood Hosp., Inc.* v. *Massachusetts Comm'n Against Discrimination*, 371 Mass. 303 (1976), this court held that implicit in this broad grant of authority, especially where retaliation is shown, is the ability to award damages for emotional distress, which is the natural and probable consequences of such retaliation. See *id.* at 315-316. (In Part 5 of this opinion we reconsider and reaffirm the *Bournewood* holding as well as that of *Buckley Nursing Home, Inc.* v. *Massachusetts Comm'n Against Discrimination*, 20 Mass. App. Ct. 172 [1985], in which the Appeals Court extended *Bournewood* to permit the commission to award damages for emotional distress in cases of employment discrimination not involving retaliation. See *id.* at 182.) We authorized an order for payment of such an award as a logical incident to the "significant delegation of discretion and authority by the Legislature" to the MCAD to fashion remedial relief and affirmatively to enforce the Commonwealth's antidiscrimination laws. *Bournewood Hosp., Inc.* v. *Massachusetts Comm'n Against Discrimination, supra* at 316. It cannot seriously be doubted that the primary thrust of the relief afforded by the MCAD is equitable in nature and oriented toward vindicating important rights not easily valued in monetary terms.

The authority of the MCAD to order, in appropriate cases, secondary relief in the form of damages to the complainant for emotional distress does nothing to transform a § 5 proceeding into a "controversy concerning property" requiring a jury trial under art. 15. See *Parker* v. *Simpson*, 180 Mass. 334, 353-355 (1902); *Commonwealth* v. *Mongardi*, 26 Mass. App. Ct. 5, 8 (1988). An award of monetary relief does not always implicate, a fortiori, an art. 15 right to a jury trial. See *Opinion of the Justices*, 309 Mass. 571, 601-602 (1941); *Opinion of the Justices*, 309 Mass. 562, 568 (1941). Indeed, the *Lavelle* court expressly recognized that, were equal protection not an issue in

the case, authority "would support the disposition of this kind of statutory discrimination claim in an administrative agency, with judicial review based only on the agency record. See *Department of Revenue* v. *Jarvenpaa*, 404 Mass. 177, 188 (1989); *Opinion of the Justices*, 309 Mass. 571, 601-602 (1941); *Opinion of the Justices*, 309 Mass. 562, 568 (1941). Cf. *Doherty v. Retirement Bd. of Medford, [supra* at 137]; *Pernell* v *Southall Realty*, 416 U.S. 363, 383 (1974) (Seventh Amendment to the United States Constitution); *Kentucky Comm'n on Human Rights* v. *Fraser*, 625 S.W.2d 852, 854 (Ky. 1981) (same); *Plasti-Line, Inc.* v. *Tennessee Human Rights Comm'n*, 746 S.W.2d 691, 693-694 (Tenn. 1988) (same under State Constitution); *Romero* v. *J & J Tire, JMH, Inc.*, 238 Mont. 146, 151 (1989) (no jury trial right in discrimination case heard by administrative agency; Seventh Amendment and State Constitution)." *Lavelle, supra* at 339.[21]

4. The question remains concerning the retroactive applicability of our acknowledgment that *Lavelle* wrongly applied *Dalis*. Our holding in Dalis was retroactive in that it entitled the plaintiff in that case to a jury trial. See *Dalis, supra* at 228. In *MacCormack* v. *Boston Edison Co.*, 423 Mass. 652, 656-658 (1996), this court applied the *Dalis* decision retroactively to all plaintiffs in other cases similarly situated, with damage claims under G. L. c. 151B, § 4, pending in the Superior Court. That decision recognized that "considerations of constitutional principle with rare exceptions require retroactive application. A constitutional decision is not a legislative act but a

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[21] In reaching our decision, it is not necessary to determine whether we should, for purposes of art. 15 analysis, adopt the "public rights" doctrine, advanced by the United States Supreme Court when considering claims of a right to a trial by jury in matters assigned for resolution to an administrative agency. See *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 51-53 (1989); *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 455 (1977).

determination of rights enacted by the Constitution, so that all persons with live claims are entitled to have those claims judged according to what we conclude the Constitution demands." *Id.* at 657, citing *Desist* v. *United States*, 394 U.S. 244, 258-259 (1969) (Harlan, J., dissenting).

It is true that our decision today extends no new constitutional rights and, viewed in terms of its practical import, curtails what, in reliance on *Lavelle*, has been assumed by many to be a respondent's State constitutional right to a trial by jury. We conclude, nevertheless, that it is appropriate that retroactive effect of our decision today be given to all cases that are still open on direct review. Principles of equity and fairness dictate that complainants who have been found by the full commission to have been illegally discriminated against not be forced to relitigate their claims in the Superior Court. We have considered the three factors enumerated in *McIntyre* v. *Associates Fin. Servs. Co. of Mass.*, 367 Mass. 708, 712 (1975), for guidance in deciding when an exception to the general rule of retroactivity might be warranted.[22] There is nothing in the record, or in the briefs submitted by the parties, to persuade us that the McIntyre criteria are sufficiently satisfied.[23]

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[22] The three factors are: "(1) whether a new principle has been established whose resolution was not clearly foreshadowed, (2) whether retroactive application will further the rule, and (3) whether inequitable results, or injustice or hardships, will be avoided by a holding of nonretroactivity." *McIntyre* v. *Associates Fin. Servs. Co. of Mass.*, 367 Mass. 708, 712 (1975).

[23] There is no need to address the waiver issue raised in the four cases under review. We note, however, that our decision in the Lavelle case issued after the cases had been certified for public hearing and after the complainants' options to institute private actions in the Superior Court had lapsed. All four respondents, nevertheless, waited until after the completion of the public hearings and the subsequent determinations by the MCAD of G. L. c. 151B violations, before giving notice of their intention to seek a de novo jury trial. For this reason alone, considerations of hardship weigh heavily in favor of the four complainants.

5. Keyland Corporation asks us to overrule *Bournewood Hosp., Inc.* v. *Massachusetts Comm'n Against Discrimination, supra,* and *Buckley Nursing Home, Inc.* v. *Massachusetts Comm'n Against Discrimination, supra,* which hold that damages for emotional distress in employment discrimination cases may be recovered on a finding of discrimination by the commission under G. L. c. 151B, § 5. We conclude that these decisions should not be overruled and express our views on considerations that the commission should apply in making such awards.

(a) The *Bournewood* decision, which allowed recovery of emotional distress damages in employment cases before the MCAD involving retaliation, has been the law for twenty-eight years. The *Buckley* decision, which allowed such damages in other employment cases before the MCAD in a finding of discrimination, has been the law for nineteen years. The *Bournewood* decision points out that the commission's authority under G. L. c. 151B, § 5, as has been quoted above, allows it to fashion remedies that involve "affirmative action, *including, but not limited to,* [certain specified remedies] *as, in the judgment of the commission, will effectuate the purposes of this chapter*" (emphasis supplied). *Bournewood, supra* at 307, 315-316, quoting G. L. c. 151B, § 5, as amended through St. 1969, c. 751, §§ 10-12. The decision emphasizes that the broad power of the commission, as articulated in § 5, and read in conjunction with the mandate in G. L. c. 151B, § 9, liberally to construe the provisions of c. 151B "for the accomplishment of the purposes thereof," namely, the commission's over-all mission, provides a "statutory basis" for the commission to award compensatory damages, which encompassed emotional distress damages in a retaliation case. *Id.* at 316. The *Buckley* decision applied the reasoning in *Bournewood* in extending the commission's right to award emotional distress damages to other employment cases where a finding of discrimination is

made. The *Bournewood* and *Buckley* decisions have been consistently applied by this court and the Appeals Court in upholding awards by the commission of emotional distress damages in employment discrimination cases. See *Wynn & Wynn, P.C.* v. *Massachusetts Comm'n Against Discrimination*, 431 Mass. 655, 657 & n.3, 675 (2000) (upholding award of $50,000 for emotional distress damages in sex discrimination case); *College-Town, Div. of Interco, Inc.* v. *Massachusetts Comm'n Against Discrimination*, *supra* at 169 (upholding award of $10,000 for emotional distress damages in sexual harassment and retaliation case); *Borne* v. *Massachusetts Comm'n Against Discrimination*, 58 Mass. App. Ct. 306, 319-321 (2003) (upholding compensatory damages award in the aggregate of $424,000 for nine plaintiffs, noting that "injury which underlay the compensatory damages was emotional distress"); *Talbert Trading Co.* v. *Massachusetts Comm'n Against Discrimination*, 37 Mass. App. Ct. 56, 57, 64-65 (1994) (upholding award of $10,000 for emotional distress damages in handicap discrimination case); *Franklin Publ. Co.* v. *Massachusetts Comm'n Against Discrimination*, 25 Mass. App. Ct. 974, 975 (1988) (upholding award of $10,000 for emotional distress damages in sex discrimination case). Awards of damages for emotional distress to compensate the victim, when made by the commission under § 5, derive from the commission's statutory mandate to fashion relief to accomplish the statute's broad purpose and, as such, are an incidental, but interdependent component of any effective method of eradicating unlawful discrimination. See Restatement (Second) of Torts § 903 comment a (1979) (differentiating between compensatory damages when there has been harm to pecuniary interests of person versus where there has been bodily harm or emotional distress, explaining that, with respect to the latter harms, "the law cannot restore the injured person to his previous position . . .

[and such harm is] not in any way analogous to a pecuniary loss, and a sum of money is not the equivalent of peace of mind").

The Legislature obviously has been aware of the *Bournewood* and *Buckley* decisions. Legislative history discloses that several attempts have been made, unsuccessfully, to modify the impact of these decisions. See, e.g., 2001 House Doc. No. 3042 (proposing in G. L. c. 151B, § 5, to limit awards for emotional distress damages to no more than $50,000); 2001 House Doc. No. 1911 (proposing to require "person claiming to be aggrieved by an alleged unlawful practice or alleged violation of [c.] 151B" to present "expert professional evidence" of emotional distress damages); 1999 House Doc. No. 3969 (proposing to require "person claiming to be aggrieved by an alleged unlawful practice or alleged violation of [c.] 151B" to present "expert professional evidence" of emotional distress damages); 1999 House Doc. No. 2840 (proposing in G. L. c. 151B, § 5, to limit awards for emotional distress damages to no more than $25,000); 1997 House Doc. No. 2262 (proposing to require "person claiming to be aggrieved by an alleged unlawful practice or alleged violation of [c.] 151B" to present "expert professional evidence" of emotional distress damages). In the meantime, the Legislature has strengthened the commission's authority by affirmatively granting the power to award attorney's fees and costs. Compare *Bournewood, supra* at 307-308 (rejecting claim that commission had authority under G. L. c. 151B, § 5, as amended through St. 1969, c. 751, §§ 10-12 [authorizing commission, after finding that employer has violated G. L. c. 151B, § 4, to issue a cease and desist order and "take such affirmative action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay"] to award attorney's fees, noting that under "American Rule," "attorney's fees are not ordinarily recoverable in the absence of statute, court

rule, enforceable contract or stipulation providing therefor"), with St. 1989, c. 722, § 27 (amending second paragraph of G. L. c. 151B, § 5, to add: "In addition to any such relief, the commission shall award reasonable attorney's fees and costs to any prevailing complainant"). See also *Fontaine* v. *Ebtec Corp., supra* at 320- 321 n.11 (noting St. 1989, c. 722, § 27 "entitles plaintiffs who pursue their cases before the commission to a remedy commensurate with the remedy to which they would be entitled if they filed suit, and prevailed, in a State or Federal court").[24] The most recent amendment to G. L. c. 151B, § 5, St. 2003, c. 26, § 438, effective July 1, 2003, St. 2003, c. 26, § 715, authorizes the commission to impose civil administrative penalties, ranging from $10,000 to $50,000, on respondents determined by the commission to have engaged in unlawful discrimination.[25] (Prior to this legislation, the MCAD

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[24] We note that, pursuant to an amendment to G. L. c. 151B, § 3, by St. 2003, c. 26, § 437, and effective July 1, 2003, the commission may now retain "reasonable attorney's fees and costs awarded to a prevailing complainant, under [§ 5], when one of its attorneys presents the charge of discrimination before the commission on behalf of the prevailing complainant."

[25] Section 438 of St. 2003, c. 26, provides:

> "If, upon all the evidence at any such hearing, the commission shall find that a respondent has engaged in any such unlawful practice, it may, in addition to any other action which it may take under this section, assess a civil penalty against the respondent:
>
> "(a) in an amount not to exceed $10,000 if the respondent has not been adjudged to have committed any prior discriminatory practice;
>
> "(b) in an amount not to exceed $25,000 if the respondent has been adjudged to have committed one other discriminatory practice during the 5-year period ending on the date of the filing of the complaint; and
>
> "(c) in an amount not to exceed $50,000 if the respondent has been adjudged to have committed 2 or more discriminatory practices during the 7-year period

was statutorily authorized to impose civil penalties only in housing discrimination cases. See St. 1989, c. 722, § 29.) It is too soon to assess with any accuracy whether, and how often, civil penalties will be imposed by the MCAD, pursuant to St. 2003, c. 26, § 438, as a means of effectuating the purposes of G. L. c. 151B. We take the addition of this potentially formidable administrative weapon against discriminatory practices further to suggest legislative acceptance of the *Bournewood* and *Buckley* decisions and the commission's authority to award emotional distress damages as a means of enforcing its broad powers, at least until the Legislature chooses to speak directly on the subject.

We note that in Federal employment discrimination cases under Title VII of the Civil Rights Act, see 42 U.S.C. §§ 2000e-2, 2000e-3, 2000e-5, 2000e-16 (2000), and the Americans with Disabilities Act (ADA), see 42 U.S.C. §§ 12117(a), 12112 (2000), in cases involving intentional discrimination,[26] the Equal Employment Opportunity Commission (EEOC), the Federal agency charged with enforcing those discrimination laws, may seek (on behalf of the "complaining party" or complainant) compensatory damages, including damages for emotional distress. See EEOC Compl. Man. § 60.6 (CCH 2004). If a complainant elects to pursue such a case in Federal

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ending on the date of the filing of the complaint. Notwithstanding the aforesaid provisions, if the acts constituting the discriminatory practice that is the object of the complaint are committed by the same natural person who has been previously adjudged to have committed acts constituting a discriminatory practice, then the civil penalties set forth in clauses (b) and (c) may be imposed without regard to the period of time within which any subsequent discriminatory practice occurred."

[26] Compensatory damages may not be awarded in cases involving disparate impact. See 42 U.S.C. § 1981a (a) (1), (2) (2000).

court,[27] pursuant to the Civil Rights Act of 1991, which amended both Title VII and the ADA, a prevailing complainant may be awarded compensatory damages, including damages for emotional distress (although those damages are limited in amount depending on the size of the employer). See *id.* at § 60.5. See also 42 U.S.C. § 1981a (a) (1) & (2), (b) (2000).

With respect to State counterparts, some State discrimination statutes authorize their enforcement agencies to remedy unlawful acts with an award of compensatory damages, including emotional distress damages. The statutory basis for such an award may be expressly stated, see, e.g., Cal. Gov't Code § 12970 (a) (Deering 2004 Supp.) (authorizing fair employment and housing commission, if it finds an unlawful practice has been committed, to "take action, including, but not limited to . . . damages for emotional injuries . . . [such as] emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses"); La. Rev. Stat. Ann. § 51:2261 (West 2003) (authorizing commission on human rights, on finding of an unlawful practice, to take "affirmative action" including payment to complainant representing "compensation for humiliation and embarrassment"); Minn. Stat. § 363A.29 (4)(a) (2003 Supp.) (authorizing administrative law judge, on finding of unfair discriminatory practice, to award compensatory damages, including "damages for mental anguish or suffering"); R.I. Gen. Laws § 28-5-24 (LexisNexis 2003) (authorizing commission for human rights, on finding intentional discrimination, to award compensatory

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[27] Although a Title VII complainant cannot initially commence a civil action in Federal court, a complainant retains the right to file such an action after filing a charge with the EEOC and regardless whether the EEOC finds "reasonable cause" to support a complainant's charge of discrimination. See 42 U.S.C. § 2000e-5 (b), (c), (e) (2000); 29 C.F.R. §§ 1601.19, 1601.28 (b) (2003).

damages without proof from complainant "that he or she has suffered physical harm or physical manifestation of injury"), or may be a matter of interpretation of a broad remedial provision, see, e.g., N.J. Stat. Ann. § 10:5-17 (West 2002) (authorizing director of division of civil rights, on finding unlawful employment practice, to "take such affirmative action, including, but not limited to, [certain specified action] as, in the judgment of the director, will effectuate the purpose of this act"), as interpreted in *Hernandez* v. *Region Nine Hous. Corp.*, 146 N.J. 645, 653 (1996), and cases cited (explaining that, under N.J. Stat. Ann. § 10:5-17, director has "broad remedial authority to cure unlawful discrimination," including the authority to award compensatory damages and "damages for pain and suffering or personal humiliation"); N.Y. Exec. Law § 297 (4) (c) (McKinney 2001) (authorizing commissioner of human rights, after finding unlawful, discriminatory practice, to award "compensatory damages"), as interpreted in *Freudenthal* v. *County of Nassau*, 99 N.Y.2d 285, 291 (2003) (explaining that, under N.Y. Exec. Law § 297 [4] [c], commissioner may award compensatory damages that include damages for "mental anguish and other forms of pain and suffering").

(b) Some concern has been expressed on the amount of emotional distress damages that the commission has been awarding in employment discrimination cases and the basis for such awards. We take this occasion to state some views on the subject.

We stress that emotional distress damages should not be improperly considered, or awarded, as a substitute for punitive damages.[28] Emotional distress damage awards, when made, should be fair and

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[28] Pursuant to G. L. c. 151B, § 9, "the court" may award punitive damages to a prevailing petitioner who opted to proceed in the Superior, Probate, or Housing Court instead of before the commission.

reasonable, and proportionate to the distress suffered. Each award should be case specific and should not be determined by formula or by precise reference points. While evidence in the form of some physical manifestation of the emotional distress, or evidence in the form of expert testimony, is not necessary to obtain an award, such evidence certainly would be beneficial. An award must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counselling or by taking medication). See Restatement (Second) of Torts § 905 comment i and § 912 (1979). In addition, complainants must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. See *id.* at § 917. Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable.

In view of the foregoing principles, we conclude that a finding of discrimination, or retaliation, by itself, is no longer sufficient to permit an inference of, or a presumption of, emotional distress. This approach is espoused by the EEOC. See EEOC: Policy Guide on Compensatory and Punitive Damages Under 1991 Civil Rights Act (July 7, 1992), reprinted in Fair Empl. Prac. Man. (BNA) 405:7091-405:7102 (stating that "[e]motional harm will not be presumed simply because the complaining party is a victim of discrimination"). To be compensable, emotional distress must be proved.

Judges acting under G. L. c. 30A in reviewing emotional distress damage awards by the commission should keep the above in mind. Judges, of course, are

aware that this aspect (as well as all others) of the commission's decision must be supported by substantial evidence and may not be arbitrary or capricious. See G. L. c. 30A, § 14 (7). Awards that are not sufficiently supported should be set aside or may be remitted to a sum deemed by the judge to be sufficient compensation in keeping with the evidence before the commission and the applicable burden of proof.

6. In view of what has been said and held above, it is not necessary to answer the questions reported by the judges in three of the cases. In each of the four cases, the respondent's request in the Superior Court for a jury trial is struck. The four cases are to be deemed as cases filed in the Superior Court for review and decision under G. L. c. 30A, on the records prepared before the commission in the G. L. c. 151B, § 5, proceedings. On this basis, the four cases are to stand for further proceedings in the Superior Court.

So ordered.

SOSMAN, J. (concurring). I concur in the court's decision to overrule *Lavelle* v. *Massachusetts Comm'n Against Discrimination*, 426 Mass. 332 (1997) (*Lavelle*), and I agree with the court's reasons for doing so. While I also concur in the court's decision not to overrule *Dalis* v. *Buyer Advertising, Inc.*, 418 Mass. 220 (1994) (*Dalis*), I have grave reservations as to whether that case was correctly decided, and therefore do not join in today's endorsement of the reasoning of *Dalis*. Instead, my concurrence with that portion of today's opinion is based solely on stare decisis.

The tests for analyzing a claim of a right to trial by jury under art. 15 of the Massachusetts Declaration of Rights are well known. Where the suit is "between two or more persons" (as is the case in all employment

discrimination suits), or the matter is a "controvers[y] concerning property," art. 15 accords a jury trial "except in cases in which it has heretofore been otherways used and practiced." Art. 15. That exception "incorporates the experience of its drafters, who sought to retain the ordinary forms and administration of the English common law (with which they were most familiar), while allowing future generations to create new forms of actions and proceedings which, for practical reasons, might not require, or be appropriate for, decision by a jury." *Commonwealth* v. *Mongardi*, 26 Mass. App. Ct. 5, 8 (1988), citing *Parker* v. *Simpson*, 180 Mass. 334, 351-355 (1902). To assess the applicability of the exception in art. 15, we consider whether the present cause of action is "analogous" to some form of claim previously recognized at common law (see *Dalis, supra* at 223), as opposed to being "a wholly new cause of action" (see *Department of Revenue* v. *Jarvenpaa*, 404 Mass. 177, 188 [1989]), and we consider whether the remedies sought are "predominantly legal" as opposed to "equitable" (see *Dalis, supra* at 226). The problem stems from the fact that these tests are not being consistently applied, perhaps due in part to their very imprecision. It is far from clear how closely linked to some common-law claim a modern day claim must be to qualify as "analogous," and, as today's decision readily illustrates, the precise same types of damages can be characterized as a "legal" remedy in one case, only to be characterized as "equitable" in another. As a result, the identical test yields inconsistent results, and our art. 15 jurisprudence cannot be harmonized with intellectual honesty.

The *Dalis* court opined that employment discrimination claims are "analogous to common law actions sounding in both tort and contract." *Dalis, supra* at 223. Today's decision, citing to a history of common-law actions for "wrongful discharge or breach of employment contract," similarly concludes that

there is an appropriate analogy between an employment discrimination claim under G. L. c. 151B and those common-law contractual causes of action. *Ante* at 559-561. However, G. L. c. 151B sweeps far more broadly than breach of contract actions by discharged employees — it creates a cause of action for persons who had *no* contractual relation with the defendant, premised on the defendant's *refusal* to enter into a contract in the first place (e.g., discriminatory refusal to hire, or refusal to promote). See G. L. c. 151B, § 4 (1) (unlawful for employer "to refuse to hire or employ or to bar or to discharge from employment" on grounds of race, color, religious creed, national origin, sex, sexual orientation, genetic information, or ancestry). See also *Whalen* v. *NYNEX Info. Resources Co.*, 419 Mass. 792, 794-795 (1995) (job applicant not offered job accorded right to jury trial on handicap discrimination claim under *Dalis*). Neither *Dalis* nor today's decision cites any precedent for the proposition that the common law recognized any cause of action for wrongful refusal to enter into an employment contract.

Claims for retaliation under G. L. c. 151B (which, in light of *Dalis*, also now enjoy a right to trial by jury, see *MacCormack* v. *Boston Edison Co.*, 423 Mass. 652, 655-656 [1996]), are also not predicated on any employment contract between the parties. Indeed, they can be brought by persons who were never employed by the defendant employer, based solely on retaliation for having assisted some other complainant, and they may be brought against defendants who are not employers or even agents of employers. See G. L. c. 151B, § 4 (4A) (unlawful for "any person" to retaliate against any "other person for having aided or encouraged any other person in the exercise or enjoyment" of any right protected by G. L. c. 151B). See also G. L. c. 151B, § 4 (4) (prohibiting retaliation by "any person, employer, labor organization or employment agency" against "any

person because he has opposed any practices forbidden under [G. L. c. 151B] or because he has filed a complaint, testified or assisted in any proceeding under [G. L. c. 151B, § 5]"). Retaliation claims can also be predicated on acts occurring after an employment contract has ended. Actions based on conduct occurring after a contract has been terminated do not constitute, nor are they even analogous to, claims for breach of contract. Although there is a preexisting employment contract between a plaintiff and a defendant employer in *some* G. L. c. 151B claims, there is no requirement that such a contract be proved, and there is no such contract in many of the fact patterns that comprise actionable employment discrimination claims under G. L. c. 151B.

Both *Dalis* and today's decision also invoke the notion that claims under G. L. c. 151B have some "tort-like aspects." *Ante* at 560. See *Dalis, supra* at 223. However, as today's decision acknowledges, "a violation of G. L. c. 151B is not a tort." *Ante* at 560. Indeed, subsequent to *Dalis*, this court has shied away from the notion that G. L. c. 151B claims are akin to tort claims. In *Thomas* v. *EDI Specialists, Inc.*, 437 Mass. 536, 538- 539 (2002), this court concluded that G. L. c. 151B actions did not sound in tort, and were not to be treated as tort claims, for purposes of any right to contribution under G. L. c. 231B. This court has also held that wage discrimination claims are not "torts" for purposes of G. L. c. 258, the Massachusetts Tort Claims Act. *Jancey* v. *School Comm. of Everett*, 421 Mass. 482, 500-501 (1995) ("acts of discrimination — whether intentional or unintentional — do not thereby become torts").

Dalis cites to one prior case from this court for the proposition that G. L. c. 151B claims are "analogous" to common- law tort actions. *Dalis, supra* at 223, citing *Conway* v. *Electro Switch Corp.*, 402 Mass. 385,

388 (1988).[1] In that case, this court was asked to determine whether a court could award "front pay" to a G. L. c. 151B plaintiff who had proved that her termination was due to sex discrimination. Noting that

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[1] *Dalis* v. *Buyer Advertising, Inc.*, 418 Mass. 220 (1994) also cites to *Gallagher* v. *Wilton Enters., Inc.*, 962 F.2d 120, 122-123 (1st Cir. 1992), in support of this proposition. That case relies on and cites to various Federal cases that have, in differing contexts, made some comparisons between various statutory causes of action and "tort" claims. First and foremost is *Curtis* v. *Loether*, 415 U.S. 189, 195 (1974), which held that a claim for unlawful discrimination in housing under Title VIII of the Civil Rights Act of 1964 "sounds basically in tort." The Court endorsed the reasoning of the court below, which recognized that the prohibition against racial discrimination in housing "could be viewed as an extension of the common-law duty of innkeepers not to refuse temporary lodging to a traveler without justification," as Title VIII now imposed that same duty on "those who rent apartments on a long-term basis." *Id.* at 195-196 n.10. The Court noted further that a claim of racial discrimination "may also be likened to an action for defamation or intentional infliction of mental distress," both of which were "still developing" under tort law. *Id.* Ironically, however, the Court went on to distinguish Title VIII claims for housing discrimination from Title VII claims for employment discrimination, declining to opine whether there was any right to jury trial for Title VII claims. *Id.* at 196-197. Ultimately, the Court held that there was *not* any right to a jury trial for Title VII claims. See *Lehman* v. *Nakshian*, 453 U.S. 156, 164 (1981); *Great Am. Fed. Sav. & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 375 & n.19 (1979).

In a similar vein, *Gallagher* v. *Wilton Enters., Inc., supra* at 123, cites *Pons* v. *Lorillard*, 549 F.2d 950, 954 (4th Cir. 1977), aff'd, 434 U.S. 575 (1978), which likened an age discrimination claim to "an action in tort." The Supreme Court's affirmance, however, rested instead on statutory grounds, concluding that Congress intentionally conferred a right to jury trial for such claims, again taking pains to *distinguish* such claims from claims brought under Title VII. *Lorillard* v. *Pons*, 434 U.S. 575, 580-585 (1978).

The remaining two cases cited in *Gallagher* v. *Wilton Enters., Inc., supra*, are not discrimination cases. See *Hill* v *Winn-Dixie Stores, Inc.*, 934 F.2d 1518, 1524 (11th Cir. 1991) (claim by worker who was constructively discharged after missing work for jury duty); *Santiago-Negron* v. *Castro-Davila*, 865 F.2d 431, 440-441 (1st Cir. 1989) (42 U.S.C. § 1983 claim for politically motivated firing).

the Legislature had amended G. L. c. 151B, § 9, to allow "a civil action for damages or injunctive relief or both," the court opined that the statute now allowed recovery for "compensatory damages." *Conway* v. *Electro Switch Corp., supra* at 387. Noting that the purpose of such damages was to "make[] the aggrieved party whole," the court saw no reason to conclude that "damages for loss of pay must be limited to the period preceding the date of judgment." *Conway* v. *Electro Switch Corp., supra* at 388, quoting *Bournewood Hosp., Inc.* v. *Massachusetts Comm'n Against Discrimination*, 371 Mass. 303, 315 (1976). In its sole reference to the concept of "tort," the court then observed: "[T]he law of the Commonwealth has traditionally allowed, as an element of tort damages, compensation for the loss of capacity to generate prospective earnings." *Conway* v. *Electro Switch Corp., supra* at 388, citing *Mitchell* v. *Walton Lunch Co.*, 305 Mass. 76 (1940).[2] In other words, the court's reference to "tort damages" was solely to illustrate the fundamental proposition that an award of damages to make someone whole sometimes needs to consider consequences extending into the future, and not just damages that have already been suffered. The court did not observe some conceptual analogy between the elements of a common-law tort claim and a claim for employment discrimination, but merely noted that the recovery in both claims would logically include compensation for loss of future earnings. Unless the court means to say that any form of statutory violation that can cause a form of damage that can also be caused by some type of common-law tort has therefore become "analogous" to a tort action, I fail to see what is so "tort like" about a G. L. c. 151B claim.

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[2] The case of *Mitchell* v. *Walton Lunch Co.*, 305 Mass. 76 (1940), involved a claim for personal injuries stemming from a restaurant manager's physical assault on a patron. The damages sought included a diminution in earning capacity as a result of those injuries. *Id.* at 77-78.

The difficulty in applying this test in a consistent fashion is most vividly illustrated by this court's decision in *Nei* v. *Burley*, 388 Mass. 307 (1983) (*Nei*), a case that *Dalis* lamely attempts to distinguish and that today's decision deliberately avoids. *Ante* at 561 n.16. In *Nei*, this court held that there was no right to a jury trial on claims brought pursuant to G. L. c. 93A. The reasons articulated in *Nei* for concluding that there is no right to a jury trial for G. L. c. 93A claims are equally applicable to G. L. c. 151B claims. *Nei* points to the fact that "although certain consumer violations are perhaps rooted in common law claims, the Legislature left the terms sufficiently open-ended to embrace causes of action for which there are no common law analogues." *Id.* at 313. The same is certainly true of G. L. c. 151B — some discrimination claims are "rooted" in theories of contract (in essence reading the prohibitions of G. L. c. 151B into the parties' employment contract and then allowing suit for "breach" of that contract), but many others arise in situations where there was never any form of contract or agreement between the parties.[3] *Nei* goes on to observe that "any analogies between common law claims for breach of contract, fraud, or deceit and claims under c. 93A are inappropriate because c. 93A dispenses with the need to prove many of the essential elements of those common law claims." *Id.* The same is true of G. L. c. 151B — the elements of an employment discrimination claim do not require proof of the elements of breach of contract, negligence, misrepresentation, assault and battery, defamation, or any other common-law claim. If anything, G. L. c. 93A

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[3] By comparison, in *Rosati* v. *Boston Pipe Covering, Inc.*, 434 Mass. 349, 351 (2001), we held that G. L. c. 149, § 27, effectively set the "contract price" for employment contracts on public construction projects, thereby making a claim under the statute "fundamentally a contract claim for wages owed under an employment contract." By their nature, all employee claims for an employer's violation of that statute involved a breach of an actual contract.

claims are, in many cases, directly grounded in and entirely duplicative of common-law claims for misrepresentation. Many others are based on a breach of contract, with some egregious circumstance surrounding that breach providing the further ingredient of "unfairness" to make out a G. L. c. 93A claim. While G. L. c. 93A extends beyond mere common-law claims, it nevertheless has a very substantial degree of overlap with the common law, an overlap that is far more extensive than that presented by G. L. c. 151B.

The result in *Nei* is also inconsistent with the notion that such statutory claims are like torts simply because the statute imposes a "duty," with the civil claim characterized as an action for "breach" of that "duty." If that were all it took to make something "tort like," then surely we would recognize that G. L. c. 93A merely expanded common-law duties to impose a "duty" to refrain from "unfair" or "deceptive" conduct. *Nei* adopts no such reasoning, and it is a reasoning that would make violation of any statutory requirement a specie of "tort."

Instead of that analysis, *Nei* observed that G. L. c. 93A "created new substantive rights in which conduct heretofore lawful under common and statutory law is now unlawful." *Nei, supra* at 315. This observation mirrors that made in other cases, namely, that the jury trial right of art. 15 does not extend to wholly new causes of action created by the Legislature. See *Department of Revenue* v. *Jarvenpaa*, 404 Mass. 177, 188 (1989) ("If a wholly new cause of action is created, a jury trial right does not attach to that claim"); *Commonwealth* v. *Guilfoyle*, 402 Mass. 130, 135 (1988) (no right to jury trial in civil rights enforcement action, noting that "[a]t common law, there was no cause of action for violations of civil rights"); *Opinion of the Justices*, 309 Mass. 562, 568 (1941) (proposed legislation granting employees right to sue employers who failed to provide workers' compensation

insurance held constitutional, despite lack of provision for jury trial, because legislation "would not provide a new remedy to enforce a common law liability, but rather, in the exercise of the police power, would attach new incidents to the relationship of employer and employee," noting that "[n]o such right in an employee as the right to [workers'] compensation was known to the law at the time the Constitution was adopted"); *Commonwealth* v. *Mongardi*, 26 Mass. App. Ct. 5, 8 (1988) (no right to jury trial on civil motor vehicle infractions, noting that newly decriminalized motor vehicle citation process was "essentially sui generis, and does not express a civil claim, right or remedy which was recognized at common law as requiring a jury trial"). Surely the same is true of claims under G. L. c. 151B — at the time the Constitution was adopted, there was no cause of action for anything remotely resembling employment discrimination — indeed, the most blatantly discriminatory practices were both lawful and widespread. "No such right in an employee as the right [to be free from discrimination] was known to the law at the time the Constitution was adopted," and G. L. c. 151B has now "attach[ed] new incidents to the relationship of employer and employee." *Opinion of the Justices, supra.* Something that was perfectly lawful at common law has now been declared unlawful, and an entirely new cause of action has been created to redress violations. If there are no jury trials in G. L. c. 93A actions because G. L. c. 93A "created new substantive rights in which conduct heretofore lawful under common and statutory law is now unlawful," *Nei, supra* at 315, then surely the same reasoning should apply to G. L. c. 151B, which, to an even greater degree than G. L. c. 93A, "created new substantive rights in which conduct heretofore lawful under common and statutory law is now unlawful."[4]

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[4] It is, of course, quite possible that it is *Nei*, and not *Dalis*, that was wrongly decided, and that the inability to harmonize the

Turning to whether the types of relief available in G. L. c. 151B claims are "predominantly legal" as opposed to "equitable," *Dalis, supra* at 226, the picture is again clouded. With the adoption of the Massachusetts Rules of Civil Procedure, we have long since merged "equitable" and "legal" proceedings, see Mass. R. Civ. P. 2, 365 Mass. 733 (1974), and perhaps our grasp of the distinctions between the two has become more shaky than it was in an earlier era when those distinctions were crucial for many purposes. Whatever the reason, we have now come to label identical forms of relief as both "equitable" and "legal," thus making it possible to characterize them either way we wish for purposes of analyzing the right to a jury trial. Today's decision invokes both labels in this inconsistent manner. In explaining its support of the *Dalis* decision, the court today opines that the damages sought in court by G. L. c. 151B plaintiffs are "predominantly legal rather than equitable," *ante* at 560, yet, in denying respondents any right to a jury trial as part of the MCAD's own proceedings, the court justifies the same damage award rendered in those proceedings as coming within the MCAD's "power to fashion equitable remedies," *ante* at 563. See *ante* at 568 ("primary thrust of the relief afforded by the MCAD is equitable in nature"). But what are the differences between these remedies, and are they stark enough to justify the conclusion that there is a right to jury trial in one form of proceeding but not in the other?

Both proceedings involve some components of relief that are unambiguously recognized as "equitable" —

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two is not attributable to anything wrong in *Dalis*. However, where our jurisprudence on the subject is sufficiently muddled to have produced these two irreconcilable cases, we should not flatly announce that "[t]here is no flaw in the reasoning or conclusion in *Dalis*," *ante* at 559, while postponing "[a]nalysis of inconsistencies in the court's reasoning in *Dalis* and in *Nei*" to "another day." *Ante* at 561 n.16.

e.g., orders that a MCAD complainant or court plaintiff be reinstated to her former position, or that a perpetrator of sexual harassment be reassigned to keep him apart from the complainant or plaintiff. As to the components of monetary awards, however, the lines become blurred. In *Dalis*, the court considered an award of monetary damages "for economic losses as well as for mental anguish" as the "legal remedy of compensatory damages." *Dalis, supra* at 224, quoting *Conway* v. *Electro Switch Corp.*, 402 Mass. 385, 387 (1988). However, in today's opinion, the court opines that the MCAD's award of emotional distress damages constitutes "remedial relief," "equitable in nature," "deriv[ing] from the [MCAD's] mandate to fashion relief." *Ante* at 563, 568, 571. If compensating a plaintiff for what she has lost as a result of unlawful employment discrimination (including lost pay and lost peace of mind) is "equitable in nature" when awarded by the MCAD, how do those same losses become the "legal remedy of compensatory damages" when sought by a plaintiff in court? In *Conway* v. *Electro Switch Corp., supra* at 387-388, the court identified "front pay" as part of "the legal remedy of compensatory damages" that a plaintiff could claim under G. L. c. 151B, yet also specified that "front pay" could be awarded by the MCAD. See *Wynn & Wynn, P.C.* v. *Massachusetts Comm'n Against Discrimination*, 431 Mass. 655, 676-677 (2000) (MCAD hearing officer declined to award front pay where evidence on issue of how long complainant would have remained at firm was speculative). Is front pay, a part of the compensation that makes a discrimination victim whole, to be treated as a "legal remedy of compensatory damages," *Conway* v. *Electro Switch Corp., supra*, or is it (when awarded by the MCAD) part of the "equitable" relief that today's decision identifies as the "primary thrust" of MCAD proceedings? *Ante* at 568.

Given the MCAD's broad authority to fashion remedies for discrimination, see G. L. c. 151B, § 5, the MCAD's power to award monetary relief to a complainant includes all of the "compensatory" (and therefore "legal" remedies) that a plaintiff could obtain in court. See *Bournewood Hosp., Inc.* v. *Massachusetts Comm'n Against Discrimination*, 371 Mass. 303, 315-316 (1976). The only component of a monetary award that may be obtained in a court proceeding but that (until recently) could not be ordered by the MCAD is punitive damages. See G. L. c. 151B, § 9, third par.[5] Does that sole difference (that has now itself disappeared) justify labeling damage awards obtained in court proceedings under § 9 as "legal" while labeling monetary awards obtained by way of MCAD orders as "equitable"?[6]

Today's decision overruling Lavelle rests on the premise that MCAD proceedings, including the monetary awards granted therein, are predominantly "remedial" and "equitable" (as opposed to "legal") in nature. *Ante* at 560, 567-568. The monetary awards themselves, the court opines, are merely "a logical incident" to the MCAD's equitable powers, just a form of "secondary relief." *Ante* at 567, 568. Cf. *Lavelle*, *supra* at 337 ("Damages for pain and suffering, emotional distress, and economic loss except perhaps back wages are not traditional forms of equitable relief and may not easily be treated as incidental to equitable relief"). If these damages are "equitable"

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[5] Effective July 1, 2003, even that difference was effectively abolished. See St. 2003, c. 26, § 438, amending G. L. c. 151B, § 5 (giving MCAD authority to impose civil penalties in employment discrimination cases).

[6] Comparison to G. L. c. 93A is again instructive. The multiple damage provisions of § 9 and § 11 are punitive in nature, see *Kapp* v. *Arbella Mut. Ins. Co.*, 426 Mass. 683, 686 (1998), quoting *Yeagle* v. *Aetna Cas. & Sur. Co.*, 42 Mass. App. Ct. 650, 655-656 (1997), yet the mere presence of punitive damages in that statutory scheme has not sufficed to confer a right to jury trial in G. L. c. 93A cases. See *Nei* v. *Burley*, 388 Mass. 307, 311-315 (1983).

when awarded by the MCAD, they do not lose their "equitable" flavor when awarded by a court. Thus, the second premise on which *Dalis* rests, namely that the damages awarded by courts in G. L. c. 151B cases are "legal" as opposed to "equitable" in nature, is also open to considerable question.

In my view, G. L. c. 151B has created an entirely new cause of action, unheard of at common law, that awards relief predominantly equitable in nature, namely, a combination of injunctive relief and monetary restitution to make the victim whole. As such, administrative proceedings before the MCAD do not violate any party's art. 15 right to a jury trial, and court proceedings instituted by a victim of discrimination do not implicate art. 15 rights either. I am thus inclined to the view that *Dalis* was wrongly decided, or, at the very least, that it cannot be reconciled with *Nei*.

I am also of the view that, at least until more recent times, the Legislature had "practical reasons" for believing that this new cause of action would not be "appropriate" for "decision by a jury." *Commonwealth* v. *Mongardi*, 26 Mass. App. Ct. 5, 8 (1988). Laws prohibiting workplace discrimination against racial and ethnic minorities, women, and homosexuals were enacted precisely because prejudices against, or stereotypical assumptions concerning, those persons were so widespread and deeply held. When the Legislature first authorized private suits to redress discrimination in 1974 (see St. 1974, c. 478), the Legislature could reasonably have been of the view that plaintiffs asserting their rights under G. L. c. 151B would face reluctance or even downright hostility from jurors, whereas judges would be better able to uphold and enforce the law as written. (By way of historical reference to illustrate the point, 1974 was the first year of court-ordered busing to desegregate the Boston public schools, a time of terrible racial strife within the city.) That discrimination claims were

to be handled either by the MCAD under § 5 or by "the court" under § 9 reflected not only the equitable nature of those newly created claims but also the practical reality of the times, namely, that jurors' sympathies would too often lie with the perpetrators, not with the victims, of discrimination.

It is for these reasons that today's uncritical reaffirmance of the analysis in *Dalis* strikes me as potentially troublesome. In the future, the Legislature may wish to address some other pervasive social problem, and may again want to create a new cause of action as part of the remedy for that problem, but may also have sound reasons for believing that juries would not be hospitable to such claims or would otherwise not be well suited to decide them. If the reasoning of *Dalis* prevails over that of *Nei*, it would be extremely difficult for the Legislature to create a new cause of action without simultaneously conferring a right to a jury trial, a right that could, in some cases, operate to undermine the very remedy the Legislature wanted to fashion.

However, a decision to overrule a prior case must be based on more than a mere academic disagreement with its analysis. By their nature, cases heard by this court regularly involve difficult issues where there is much to be said for both sides. Whatever result the court reaches thus remains open to justifiable criticism in future years. It is the doctrine of stare decisis that comes to the rescue and allows us to avoid endless revisiting of what were, and will always remain, difficult legal issues. "Stare decisis is a salutary principle, because in most matters a settled rule on which reliance can be placed is of more importance than the precise form of the rule." *Kabatchnick* v. *Hanover-Elm Bldg. Corp.*, 328 Mass. 341, 346-347 (1952). "While perhaps it is more important as to far-reaching juridical principles that the court should be right, in the light of higher civilization, later and more careful examination of

authorities, wider and more thorough discussion and more mature reflection upon the policy of the law, than merely in harmony with previous decisions . . . it nevertheless is vital that there be stability in the courts in adhering to decisions made after ample consideration. Parties should not be encouraged to seek re-examination of determined principles and speculate on a fluctuation of the law with every change in the expounders of it." (Citation omitted.) *Mabardy* v. *McHugh*, 202 Mass. 148, 152 (1909).

Thus, in order to overrule a prior case, it is not enough that some or all of the Justices of this court have some intellectual or academic disagreement with the earlier analysis of the issue. There must be something more, above and beyond such a disagreement, that would justify some exception to the doctrine of stare decisis. Here, whatever my concerns as to the soundness of the reasoning in *Dalis*, I see no problem or injustice that results from continued adherence to the holding of that case. While I doubt that there is a constitutional right to jury trials in G. L. c. 151B cases, juries are now perfectly competent to decide such cases. Trials of employment discrimination claims customarily hinge on assessments of witness credibility and motive, issues that jurors are particularly well equipped to resolve. Adherence to *Dalis* also has the pragmatic benefit of making State law employment discrimination claims under G. L. c. 151B procedurally consistent with Title VII claims under Federal law, which can also be tried to a jury. See 42 U.S.C. § 1981a (c)(1) (2000).[7] There have been no particular problems encountered in

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[7] Prior to the Civil Rights Act of 1991, Pub. L. No. 102- 166, 105 Stat. 1071, the Supreme Court had stated that there was no right to a jury trial in Title VII cases. See *Lehman* v. *Nakshian*, 453 U.S. 156, 165 (1981). The 1991 Act effectively overturned that line of precedent. See Pub. L. 102-166, § 102 (codified in 42 U.S.C. § 1981a[c][1] [2000]). See also *Tyler* v. *Bethlehem Steel Corp.*, 958 F.2d 1176, 1181 (2d Cir.), cert. denied, 506 U.S. 826 (1992).

having juries decide these claims, and, after more than a decade's experience with such jury trials post-*Dalis*, there is no reason to think that any such problems lurk on the horizon.[8] As today's decision points out, none of the parties before us (and none of the amici) has asked us to overrule *Dalis*, which suggests that litigants and practitioners on both sides are content with the status quo. I am disinclined to fix something that is not broken, even if I would have constructed it differently in the first place.

Nor do I see any unfairness in overruling *Lavelle* while continuing to adhere to the holding in *Dalis*. In my view, *Dalis* gives both sides something that they are not actually entitled to, namely, a right to a jury trial on § 9 claims. That both sides have that undeserved benefit under this court's analysis of § 9 does not make it unfair to give them only what they are entitled to in proceedings under § 5. As is customary, it is the claimant who chooses the forum in which to pursue her claim, and the procedures available to both parties in whichever forum is chosen are abundantly fair to both sides. If this court has incorrectly added yet another procedural option in one forum, that additional option has not created any imbalance or unfairness that I can see.

I am thus satisfied that today's decision properly overrules *Lavelle*, but it is stare decisis, and stare decisis alone, that convinces me to adhere to the holding in *Dalis*.

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[8] By comparison, the court's overruling of *Lavelle* in today's decision is well justified. Beyond the errors in its analysis, the *Lavelle* decision has literally wreaked havoc with the conduct of MCAD proceedings, undercut the MCAD's role in enforcing G. L. c. 151B, caused substantial delay in the resolution of discrimination claims, and produced a plethora of difficult substantive and procedural questions as to the interplay between the MCAD proceedings, the MCAD's decision, and a subsequent jury trial. When an erroneous decision has, in the vernacular, "created a monster," as *Lavelle* has done, stare decisis does not stand in the way of our correcting that error.

COWIN, J. (dissenting). Our decision in *Dalis* v. *Buyer Advertising, Inc.*, 418 Mass. 220 (1994) (*Dalis*), stated that, pursuant to art. 15 of the Massachusetts Declaration of Rights, plaintiffs in G. L. c. 151B actions could demand a jury trial. In *Lavelle* v. *Massachusetts Comm'n Against Discrimination*, 426 Mass. 332 (1997) (*Lavelle*), we conferred a reciprocal right on respondents. I am not persuaded by the logic underlying *Dalis*, particularly in view of the fact that antidiscrimination suits were totally unknown at common law. However, I could accept the conclusion in *Dalis* in tandem with the holding in *Lavelle* to prevent a denial of equal protection. But overruling *Lavelle* while preserving *Dalis* creates an unconstitutional asymmetry that empowers plaintiffs unilaterally to extinguish respondents' access to a jury trial merely by choosing under which section of the statute to proceed. Therefore, I respectfully dissent.

The right to a jury trial is fundamental. *Aetna Ins. Co.* v. *Kennedy*, 301 U.S. 389, 393 (1937). *Spence* v. *Reeder*, 382 Mass. 398, 411 (1981). Article 15 preserves that right "[i]n all controversies concerning property, and in all suits between two or more persons," but makes an exception for those types of cases that would have been resolved in equity courts, as opposed to common-law courts, before 1780. See *Parker* v. *Simpson*, 180 Mass. 334, 355 (1902). In *Dalis, supra* at 223, this court concluded that the art. 15 right to a jury trial attaches to sex discrimination claims under G. L. c. 151B, § 9, because those claims are purportedly "analogous to common-law actions sounding in both tort and contract."

However, *Dalis* was inconsistent with our earlier decision in *Nei* v. *Burley*, 388 Mass. 307 (1983), in which we concluded that an action for "unfair or deceptive acts or practices" under the consumer protection act, G. L. c. 93A, did not give rise to a jury trial right. The *Nei* decision was predicated in part on the fact that G. L. c. 93A, while it often involves

actions analogous to common-law tort and contract claims, is not limited by those traditional legal theories and sometimes "embrace[s] causes of action for which there are no common-law analogues." *Id.* at 313. Similarly, G. L. c. 151B encompasses many claims that are not analogous to common-law contract or tort actions.[1] As a practical matter, neither consumer protection nor sex discrimination causes of action would have been familiar to a court in 1780; both may be analogous to traditional claims, but both also exceed the scope of that tradition.[2] The court's references to early cases involving wrongful discharge and breach of employment contract claims prove nothing in this regard. The existence of such cases does not speak to whether employment discrimination was actionable at common law.

Assuming Dalis was correctly decided, however, and a jury trial right attaches to § 9 claims, that right must be equally available to plaintiffs and respondents.[3] See *Lavelle, supra* at 338. See also *FUD's, Inc.* v. *State*, 727 A.2d 692, 697 (R.I. 1999). However, *Dalis* left respondents without this right. In a G. L. c. 151B action, it is the plaintiff who decides

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[1] For example, G. L. c. 151B, § 4, prohibits employers from refusing to hire members of protected classes, owners of land from refusing to sell or lease to protected classes, and retailers from refusing to extend credit because of a person's age.

[2] The Legislature can authorize a jury trial to one aggrieved by the violation of a statute even where art. 15 does not demand it. *Whalen* v. *Nynex Info. Resources Co.*, 419 Mass. 792, 794 (1995); *Nei* v. *Burley*, 388 Mass. 307, 312 (1983). However, aside from explicitly authorizing jury trials for claims of age discrimination in employment in G. L. c. 151B, § 9, the Legislature did not exercise this power with regard to other parts of the statute. See *Nei* v. *Burley, supra* at 314 (refusing "to imply a right to a jury trial" under G. L. c. 93A in absence of explicit legislative recognition of such right).

[3] For the sake of clarity, I use the term "plaintiffs" to refer both to "complainants" proceeding under G. L. c. 151B, § 5, and to aggrieved persons seeking a civil remedy in court under G. L. c. 151B, § 9.

whether to pursue an administrative remedy under § 5, or to proceed under § 9 in the civil courts, thereby taking advantage of the jury trial right granted in *Dalis*. Under this regime, plaintiffs had the unilateral power, by choosing § 5, to deprive the respondent of a jury trial.

Lavelle, supra at 338, remedied this inequity by concluding that when a plaintiff elects to proceed under G. L. c. 151B, § 5, the respondent must be entitled to demand a jury trial at some point in the proceeding.[4] This conclusion was based on two overarching concepts. First, pursuant to the reasoning in *Dalis*, we concluded that, because the Massachusetts Commission Against Discrimination (MCAD), in a § 5 proceeding may award damages that go beyond traditional areas of equity, such as pain and suffering, emotional distress, and economic loss, the "sacred" and fundamental art. 15 right to a jury trial was necessarily invoked. *Id.* at 337. Second, because *Dalis* concluded that art. 15 granted the right to a jury trial to plaintiffs, equal protection demanded that "[i]f one side to a dispute has a constitutional right to a jury trial . . . the other side must have a similar right." Id. If the first proposition was a proper statement of constitutional law, the second was necessary to avoid a different constitutional violation. A fundamental right, even if erroneously available, must be available to both parties.

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[4] The court notes that *Lavelle* itself recognized that certain respondents might secure "two chances to prevail," one before the MCAD and again before a jury. *Lavelle* v. *Massachusetts Comm'n Against Discrimination*, 426 Mass. 332, 338 (1997). The *Lavelle* court reasoned that this potential inequity (one that did not implicate constitutional concerns) was a temporary expedient to prevent an immediate constitutional violation, until such time as the Legislature acted to provide another solution. *Id.* at 338-339. That immediate constitutional violation, it bears repeating, was securing for the plaintiff both the fundamental right to a jury trial, and the ability unilaterally to deprive the respondent of that same right.

The court characterizes the advantage it confers on plaintiffs as a product of a mere choice of forum or avenue for redress, citing *Panama R.R.* v. *Johnson*, 264 U.S. 375, 392-393 (1924); *New York & Mass. Motor Serv., Inc.* v. *Massachusetts Comm'n Against Discrimination*, 401 Mass. 566, 550-581 (1988); and *Paro* v. *Longwood Hosp.*, 373 Mass. 645, 648-652 (1977). *Ante* at - . None of these cases allowed one side of a legal dispute unilaterally to deprive the opponent of a fundamental right. In *New York & Mass. Motor Serv., Inc.* v. *Massachusetts Comm'n Against Discrimination, supra* at 579-580, the respondent claimed that the statutory scheme of G. L. c. 151B violated equal protection because it allowed plaintiffs, by electing an administrative remedy under § 5, to force respondents into a proceeding that did not adhere to the strict rules of evidence, required proof by "substantial evidence" instead of a "fair preponderance," and permitted respondents only judicial review under the standard of G. L. c. 30A. In that case, we found no merit to the respondent's claim, but we went out of our way to point out that we were not addressing a fundamental right. *Id.* at 580-581. See *Lavelle* v. *Massachusetts Comm'n Against Discrimination, supra* at 336. Similarly, the Johnson Court, supra at 392-393, addressed the right of injured seamen to elect alternative measures of redress, but not the substance of the "measure of redress or either form of action." In *Paro* v. *Longwood Hosp., supra* at 648-651, the plaintiffs challenged a statute which required medical malpractice claimants who cannot convince a tribunal that their claims "raise a legitimate question of liability," G. L. c. 231, § 60B, to post a bond before pursuing their claims in the courts. Once again, we explicitly stated that "[n]o claim is made in this case that a fundamental interest . . . is involved . . . ." *Id.* 650. Unlike those cases, here we are dealing with one party's ability to deprive

another party of a constitutionally guaranteed, fundamental right.

The court also goes to great lengths to distinguish § 9 "private actions" from § 5 "civil administrative proceedings," the "primary purpose of [which] is to vindicate the public's interest." *Ante* at 563, 567. This distinction is artificial. Nowhere in G. L. c. 151B, or in our prior cases, is it established that the vindication of the public's interest in prosecuting discrimination claims in general is the "primary purpose" to be promoted over the vindication of the private interests of those adversely affected by that discrimination. The cases cited by the court for this proposition, *Thomas* v. *EDI Specialists, Inc.*, 437 Mass. 536, 541-542 (2002), and *College Town, Div. of Interco, Inc.* v. *Massachusetts Comm'n Against Discrimination*, 400 Mass. 156, 170 (1987), state only that the MCAD has broad authority to remedy and reduce discrimination in the workplace. *Ante* at 563.

Irrespective of debates over the abstract purpose of antidiscrimination laws, in reality, proceedings under G. L. c. 151B, § 5, are just as much cases between two parties as are civil actions proceeding under G. L. c. 151B, § 9. The court cites *Zora* v. *State Ethics Comm'n*, 415 Mass. 640, 652-653 (1993), for the proposition that administrative proceedings before the MCAD "do not involve a suit between two or more persons." *Ante* at 567. But *Zora* addressed G. L. c. 268A, a statutory scheme that authorizes actions only by the State Ethics Commission, and makes no provision for private actions. By contrast, when a plaintiff elects to proceed under G. L. c. 151B, § 5, the matter is for all intents and purposes a private suit in which a private plaintiff seeks private remedies. The MCAD does not initiate the suit; it merely puts its resources behind the plaintiff's claims in those cases where it finds that there is "probable cause" to credit those claims. The plaintiff advances the identical substantive claims under § 5 as he or she would under § 9; the plaintiff is

able to request the same remedies as under § 9 (with the exception of punitive damages); and prevailing plaintiffs are often (in fact, almost always according to the MCAD's supplemental brief) awarded remedies that exceed the scope of equitable relief. Further, the plaintiff retains control over important aspects of the case. If the MCAD wishes to settle but the plaintiff does not, the plaintiff is entitled to remove the case to the civil courts. 804 Code Mass. Regs. 1.18 (4) (1998). The plaintiff also may unilaterally remove the complaint from the commission after ninety days, regardless of the public's interest in the case. G. L. c. 151B, § 9.

Despite these indicia of a private action at law, the court insists on labeling proceedings under § 5 as somehow more administrative and equitable in nature than private actions. But this denomination is belied by the court's simultaneous concern about the amount of emotional distress damages routinely awarded by the commission to plaintiffs. *Ante* at 575. The court's attempt to rein in those amounts by suggesting guiding principles and factors is tellingly reminiscent of the type of instructions that would be given to a jury at a trial. But even assuming arguendo that, in cases proceeding under § 5, the MCAD is not participating in a private action but primarily acting to vindicate public rights, there is still no permissible basis for granting the right to a jury trial only to one side of a dispute simply by declaring that the process is "administrative," at least while the proceeding may result in an order that compels a respondent to pay, sometimes substantially, for the plaintiff's alleged losses.

Today the court, in the name of vindicating the State's antidiscrimination policy, visits discrimination on an entire class of citizens, those who find themselves respondents at the MCAD. If we are to have *Dalis*, simple fairness dictates that we have *Lavelle*. Our continued tinkering with this statute is,

respectfully, making bad matters worse, and therefore I dissent.

APPENDIX B

SUPREME JUDICIAL COURT
for the Commonwealth
Case Docket

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY vs. GERALDINE ROSS & another
SJC-09002

10/16/2003
#17
ORDER (By the Court): This case will be reargued at the Court's February, 2004, sitting. The parties may, if they wish, file supplemental briefs or memoranda on or before January 15, 2004, on the question whether Dalis v. Buyer Advertising, Inc., 418 Mass. 220 (1994), was correctly decided. See attached copy of amicus announcement. (Notice to counsel.)

10/16/2003
#17.5
ANNOUNCEMENT: These cases (SJC-9002, -9081, -9100, -9112) involve a variety of issues regarding the assertion of jury trial rights by parties that were respondents in proceedings before the Massachusetts Commission Against Discrimination. See Lavelle v. MCAD, 426 Mass. 332 (1997). Amici are invited to address the various issues raised by the parties as well as the additional question, not raised by the parties, whether Dalis v. Buyer Advertising Inc., 418 Mass. 220 (1994) was correctly decided. Arguments are scheduled for Feb. 2004. (Distributed to list on file.)

APPENDIX C

May 28, 2004

The Honorable Margaret H. Marshall
Chief Justice
Supreme Judicial Court
Commonwealth of Massachusetts
One Beacon St., Room 303
Boston, Massachusetts 02108

Re: Stonehill College v. MCAD, et al. No. SJC-09112; Wilfert Bros. Realty Co. v. MCAD, et al. No. SJC-09081; Keyland Corp. v. MCAD, et al. No. SJC-09100; MBTA v. MCAD, et al. No. SJC-09002

Dear Chief Justice Marshall:

Appellants, Stonehill College, Massachusetts Bay Transportation Authority, and Appellees Wilfert Brothers Realty Co., Keyland Corporation (collectively referred to as "respondent employers") respectfully petition for rehearing, pursuant to Mass. R. App. P. 27, of this Court's consolidated decision issued May 6, 2004, in the above-referenced cases on the grounds that the Court has overlooked certain significant points of law. Specifically, the respondent employers seek a rehearing on the ground that the Court has overlooked the federal basis for its prior decision in Lavelle v. MCAD, 426 Mass. 332 (1997). Respondent employers urge this Court to allow a rehearing to address and clarify its grounds for overruling that portion of Lavelle which deprives employers of their Fourteenth Amendment jury trial right as recognized in Lavelle.

In Stonehill College v. MCAD, 441 Mass. 549 (2004), this Court holds "the Dalis decision does not require, as a matter of State Constitutional law, the

result reached by Lavelle." Id. at 552. Compare Michigan v. Long, 463 U.S. 1032, 1040-41 (1983) (discussing when state court decisions rest upon adequate and independent state grounds). Accordingly, this Court holds, "the jury trial holding in Lavelle should be overruled." Id. at 562. Unfortunately, this Court overlooks that its equal protection holding in Lavelle was based solely upon federal constitutional law under the Fourteenth Amendment.

This Court in Lavelle expressly recognized that the respondent, James Lavelle, founded his equal protection argument solely upon the Fourteenth Amendment and not upon a variety of possible state constitutional grounds. See Lavelle, 426 Mass. at 336, n.6. Thus, this Court recognized the jury trial rights of employers defending against chapter 151B allegations as a matter of federal law. Indeed, as recently as June, 2000, this Court noted that the right to a jury trial was well developed and that the decision in Lavelle, "was the inevitable jurisprudential step that followed Dalis and MacCormack." Wynn & Wynn P.C. v. MCAD, 431 Mass. 655, 663-64 (2000). *A fortiori,* any reversal of Lavelle must correctly apply and interpret federal constitutional doctrine.

Notably, this Court recently had the opportunity to evaluate equality safeguards of the Massachusetts Constitution in the opinion of Goodridge v. Department of Public Health, 440 Mass. 309 (2003). In that decision, this Court recognized "the Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language." Goodridge, 440 Mass. at 328. The Court's opinion in Stonehill College is inconsistent with this approach, contravening the Fourteenth Amendment by giving employers less protection under the Massachusetts Constitution than

they are given under the federal constitution. As Justice Cowin's dissenting opinion intuitively observes, "overruling Lavelle while preserving Dalis creates an unconstitutional asymmetry" that treats employees and their employers unequally. See 441 Mass. at 590. Given the Fourteenth Amendment underpinnings of Lavelle, this Court cannot rely upon state constitutional analysis to overrule a federal constitutional holding.

The Court's decision in New York & Massachusetts Motor Serv. Inc. v. MCAD, 401 Mass. 566 (1988) ("Motor Services") also involved federal equal protection analysis under the Fourteenth Amendment, but did not consider whether recognizing a fundamental right to a jury trial of chapter 151B controversies would alter that analysis. See 401 Mass. at 580-81. The Motor Services decision held that the Legislature, in permitting employee accusers under chapter 151B the right to adjudicate their employment discrimination controversies before the court without a jury while depriving accused employers of a similar right, did not violate the Fourteenth Amendment because the Legislature's choice implicated no "fundamental" right and because judicial review of a claim against the accused would obtain in the context of a separate chapter 30A appeal deemed to be substantially equal to a bench trial in Superior Court. Id. at 580-81.

Significantly, however, this Court's separate-but-equal jurisprudence in Motor Services had yet to confront whether recognizing a fundamental right to a jury trial of employment discrimination claims would make a difference, as nine years later this Court concluded in Lavelle it would. Lavelle, 426 Mass. at 332. As such, the decision in Motor Services failed to consider the distinctions between so-called causes of action under sections 5 or 9 of chapter 151B and did not attempt to equate judicial review under chapter 30A with decision making by a jury of an employer's

peers. Language in the Stonehill College opinion, see 441 Mass. at 564, intimating that this Court's holding in Dalis did little to alter the federal equal protection analysis contained in Motor Services, overlooks this crucial development. Consequently, so long as this Court upholds Dalis, the reasoning of Motor Services is inapplicable today because the Court therein had yet to recognize that fundamental rights attach to employment discrimination controversies seeking money-damages-type legal remedies as it did later in Dalis. See Lavelle, 426 Mass. at 337.

The opinion in Stonehill College posits that recognizing a distinction between procedures afforded by section 5 and section 9 of chapter 151B solves the equal protection dilemma. See 441 Mass. at 561-562. The Court, however, has undertaken no separate analysis of modern Fourteenth Amendment jurisprudence - other than to cite Motor Services, which Lavelle recognized did not decide the question, and the dated case of Panama R.R. v. Johnson, 264 U.S. 375, 392-93 (1924) which is inapposite - even if for the sake of argument jury trial rights with respect to civil administrative proceedings under § 5 can be considered separately. But see 441 Mass. at 593-94 (Cowin, J. dissenting).

In Panama R.R. there was no common law or Seventh Amendment right to a jury trial of admiralty or maritime claims, for either party. When Congress, which the Supreme Court found to be "empowered by the constitutional provision to alter, qualify or supplement the maritime rules," Panama R.R., 264 U.S. at 388, statutorily authorized one party - a seaman injured in the course of his employment - to have the ability to elect a jury trial when no right to one existed previously, the Supreme Court held the legislation did not violate Fifth Amendment due process because the choice was between the new rules and the old ones, not between maritime law and some non-maritime system. Id. at 388-89.

In Stonehill College, having imbued the distinction between section 5 and section 9 rights with constitutional significance, the Court should not stop short and fail to follow the implications of that logic through with respect to the Legislative scheme that establishes "private actions" by applying the holding in Panama R.R. as if the employer or the employees in that case had a jury right to begin with.

Petitioners urge this Court to allow a rehearing to address and clarify the federal equal protection question given the importance of the issue presented and its susceptibility for recurrence. Without timely guidance from this Court, another seven years may elapse before the next Lavelle-type claim makes its way to the Court for determination, leaving the bar and all parties confused about their rights and hindered in their ability to commit resources in a predictable, correct and fairminded fashion.

Very truly yours,

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APPENDIX D

SUPREME JUDICIAL COURT
for the Commonwealth
Case Docket

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY vs. GERALDINE ROSS & another
SJC-09002

06/03/2004
#56
DENIAL of petition for rehearing. (By the Court)
Notice to counsel.

APPENDIX E

Amendment 14

Section. 1. **[Citizens of the United States.]**
All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . . . .

Section. 5. **[Power to enforce amendment.]**
The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX F

CHAPTER 151B. UNLAWFUL DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGIOUS CREED, NATIONAL ORIGIN, ANCESTRY OR SEX

Chapter 151B: Section 5 Complaints; procedure; limitations; bar to proceeding; award of damages

Section 5. Any person claiming to be aggrieved by an alleged unlawful practice or alleged violation of clause (e) of section thirty-two of chapter one hundred and twenty-one B or sections ninety-two A, ninety-eight and ninety-eight A of chapter two hundred and seventy-two may, by himself or his attorney, make, sign and file with the commission a verified complaint in writing which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful practice complained of or the violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A which shall set forth the particulars thereof and contain such other information as may be required by the commission. The attorney general may, in like manner, make, sign and file such complaint. The commission, whenever it has reason to believe that any person has been or is engaging in an unlawful practice or violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A, may issue such a complaint. Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this chapter, may file with the commission a verified complaint asking for assistance by conciliation or other remedial action.

After the filing of any complaint, the chairman of the commission shall designate one of the commissioners

to make, with the assistance of the commission's staff, prompt investigation in connection therewith. If such commissioner shall determine after such investigation that no probable cause exists for crediting the allegations of the complaint, the commission shall, within ten days from such determination, cause to be issued and served upon the complainant written notice of such determination, and the said complainant or his attorney may, within ten days after such service, file with the commission a written request for a preliminary hearing before the commission to determine probable cause for crediting the allegations of the complaint, and the commission shall allow such request as a matter of right; provided, however, that such a preliminary hearing shall not be subject to the provisions of chapter thirty A. If such commissioner shall determine after such investigation or preliminary hearing that probable cause exists for crediting the allegations of a complaint relative to a housing practice, the commissioner shall immediately serve notice upon the complainant and respondent of their right to elect judicial determination of the complaint as an alternative to determination in a hearing before the commission. If a complainant or respondent so notified wishes to elect such judicial determination, he shall do so in writing within twenty days of receipt of the said notice. The person making such election shall give notice of such election to the commission and to all other complainants and respondents to whom the probable cause finding relates. The commission, upon receipt of such notice, shall dismiss the complaint pending before it without prejudice and the complainant shall be barred from subsequently bringing a complaint on the same matter before the commission. If any complainant or respondent elects judicial determination as aforesaid, the commission shall authorize, and not later than thirty days after the election is made the attorney general shall commence and maintain, a civil action

on behalf of the complainant in the superior court for the county in which the unlawful practice occurred. Any complainant may intervene as of right in said civil action. If the court in such civil action finds that a discriminatory housing practice has occurred or is about to occur, the court may grant any relief which a court could grant with respect to such discriminatory housing practice in a civil action under section nine. Any relief so granted that would accrue to an aggrieved person in a civil action commenced by that aggrieved person under said section nine shall also accrue to that aggrieved person in a civil action under this section. If such commissioner shall determine after such investigation or preliminary hearing that probable cause exists for crediting the allegations of any complaint and no complainant or respondent has elected judicial determination of the matter, he shall immediately endeavor to eliminate the unlawful practice complained of or the violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A by conference, conciliation and persuasion. The members of the commission and its staff shall not disclose what has occurred in the course of such endeavors, provided that the commission may publish the facts in the case of any complaint which has been dismissed, and the terms of conciliation when the complaint has been so disposed of. In case of failure so to eliminate such practice or violation, or in advance thereof if in his judgment circumstances so warrant, he shall cause to be issued and served in the name of the commission, a written notice, together with a copy of such complaint, as the same may have been amended, requiring the person, employer, labor organization or employment agency named in such complaint, hereinafter referred to as respondent, to answer the charges of such complaint at a hearing before the commission, at a time and place to be specified in such notice. The place of any such hearing shall be

the office of the commission or such other place as may be designated by it. Before or after a determination of probable cause hereunder such commissioner may also file a petition in equity in the superior court in any county in which the unlawful practice which is the subject of the complaint occurs, or in a county in which a respondent resides or transacts business, or in Suffolk county, seeking appropriate injunctive relief against such respondent, including orders or decrees restraining and enjoining him from selling, renting or otherwise making unavailable to the complainant any housing accommodations or public accommodations with respect to which the complaint is made, pending the final determination of proceedings under this chapter. An affidavit of such notice shall forthwith be filed in the clerk's office. The court shall have power to grant such temporary relief or restraining orders as it deems just and proper. The case in support of the complaint shall be presented before the commission by one of its attorneys or agents or by an attorney retained by the complainant, and the commissioner who shall have previously made the investigation and caused the notice to be issued shall not participate in the hearing except as a witness, nor shall he participate in the deliberations of the commission in such case except when necessary to decide an appeal to the full commission; and the aforesaid endeavors at conciliation shall not be received in evidence. If an investigating commissioner determines that probable cause exists to credit the allegations of a complainant that a respondent has refused to sell, rent or lease, or to negotiate in the sale, rental, or leasing of, housing accommodations or commercial space and if he determines that such respondent is a nonresident of the commonwealth and cannot be personally served with process in the commonwealth, such investigating commissioner may file a petition in equity in the nature of an in rem proceeding seeking appropriate

injunctive relief against such property with respect to which a complaint has been made, including orders or decrees restraining and enjoining any sale, rental, lease, or other disposition of such property which would render it unavailable to the complainant pending the final determination of proceedings under this chapter. Such commissioner shall send by registered mail, with return receipt requested, a copy of such petition to the last address of such respondent known to the commissioner. An affidavit of compliance herewith, and the respondent's return receipt or other proof of actual notice, if received, shall be filed in the case on or before the return day of the process or within such further time as the court may allow. A copy of the order or decree of the court running against such property of a nonresident respondent shall be recorded in the registry of deeds in the county wherein such housing accommodations or commercial space is located, and a copy of such order or decree shall be attached in a conspicuous place to the property which has been the subject of a complaint under section four by the sheriff of the county wherein such property is located, or by his authorized agent or employee. Any person purchasing housing accommodations or commercial space, subsequent to the recording of the order or decree in the registry of deeds, shall be, as a matter of law, bound by the terms of any order which the commission has made or may make relating to such property which has been the subject of an order or decree of the superior court. Any person renting or leasing housing accommodations or commercial space subsequent to the attachment of a copy of an order or decree referred to above by the sheriff of the county wherein such property is located or by his authorized agent or employee shall be, as a matter of law, bound by the terms of any order which the commission has made or may make relating to such property. The respondent may file a written verified answer to the complaint and

appear at such hearing in person or otherwise, with or without counsel, and submit testimony. In the discretion of the commission, the complainant may be allowed to intervene and present testimony in person or by counsel. The commission or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent shall have like power to amend his answer. The commission shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and be transcribed at the request of any party. If, upon all the evidence at the hearing the commission shall find that a respondent has engaged in any unlawful practice as defined in section four or violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful practice or violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A to take such affirmative action, including but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, or restoration to membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purposes of this chapter or of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A, and including a requirement for report of the manner of compliance. Such cease and desist orders and orders for affirmative relief may be issued to operate prospectively. If, upon all the evidence, the commission shall find that a respondent has not engaged in any such unlawful practice or violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A, the commission shall state its findings of fact and

shall issue and cause to be served on the complainant an order dismissing the said complaint as to such respondent. In addition to any such relief, the commission shall award reasonable attorney's fees and costs to any prevailing complainant. A copy of its order shall be delivered in all cases to the attorney general and such other public officers as the commission deems proper. The commission shall establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereunder. Any complaint filed pursuant to this section must be so filed within 300 days after the alleged act of discrimination. The institution of proceedings under this section, or an order thereunder, shall not be a bar to proceedings under said sections ninety-two A, ninety-eight and ninety-eight A, nor shall the institution of proceedings under said sections ninety-two A, ninety-eight and ninety-eight A, or a judgment thereunder, be a bar to proceedings under this section.

If upon all the evidence at any such hearing the commission shall find that a respondent has engaged in any such unlawful practice relative to housing or real estate or violated clause (e) of said section thirty-two it may, in addition to any other action which it may take under this section, award the petitioner damages, which damages shall include, but shall not be limited to, the expense incurred by the petitioner for obtaining alternative housing or space, for storage of goods and effects, for moving and for other costs actually incurred by him as a result of such unlawful practice or violation. Any person claiming to be aggrieved by such an award of damages may, notwithstanding the provisions of section six and within ten days of notice of such award, bring a petition in the municipal court of the city of Boston or in the district court within the judicial district of which the respondent resides, addressed to the justice

of the court, praying that the action of the commission in awarding damages be reviewed by the court. After such notice to the parties as the court deems necessary, it shall hear witnesses, review such action, and determine whether or not upon all the evidence such an award was justified and thereafter affirm, modify or reverse the order of the commission. The decision of the court shall be final and conclusive upon all the parties as to all matters of fact.

[Fourth paragraph effective until July 1, 2003. For text effective July 1, 2003, see below.]

If upon all the evidence at any such hearing the commission shall find that a respondent has engaged in any such unlawful practice relative to a housing practice it may, in addition to any other action which it may take under this section, assess a civil penalty against the respondent:

(a) in an amount not to exceed ten thousand dollars if the respondent has not been adjudged to have committed any prior discriminatory housing practice;

(b) in an amount not to exceed twenty-five thousand dollars if the respondent has been adjudged to have committed one other discriminatory housing practice during the five year period ending on the date of the filing of the complaint; and

(c) in an amount not to exceed fifty thousand dollars if the respondent has been adjudged to have committed two or more discriminatory housing practices during the seven year period ending on the date of the filing of the complaint. Notwithstanding the aforesaid provisions, if the acts constituting the discriminatory housing practice that is the object of the complaint are committed by the same natural person who has been previously adjudged to have

committed acts constituting a discriminatory housing practice, then the civil penalties set forth in clauses (b) and (c) may be imposed without regard to the period of time within which any subsequent discriminatory housing practice occurred.

[Fourth paragraph as amended by 2003, 26, Sec. 438 effective July 1, 2003. See 2003, 26, Sec. 715. For text effective until July 1, 2003, see above.]

If, upon all the evidence at any such hearing, the commission shall find that a respondent has engaged in any such unlawful practice, it may, in addition to any other action which it may take under this section, assess a civil penalty against the respondent:

(a) in an amount not to exceed $10,000 if the respondent has not been adjudged to have committed any prior discriminatory practice;

(b) in an amount not to exceed $25,000 if the respondent has-been adjudged to have committed one other discriminatory practice during the 5-year period ending on the date of the filing of the complaint; and

(c) in an amount not to exceed $50,000 if the respondent has been adjudged to have committed 2 or more discriminatory practices during the 7-year period ending on the date of the filing of the complaint. Notwithstanding the aforesaid provisions, if the acts constituting the discriminatory practice that is the object of the complaint are committed by the same natural person who has been previously adjudged to have committed acts constituting a discriminatory practice, then the civil penalties set forth in clauses (b) and (c) may be imposed without regard to the period of time within which any subsequent discriminatory practice occurred.

Chapter 151B: Section 9 Construction and enforcement of chapter; inconsistent laws; exclusiveness of statutory procedure; civil remedies; speedy trial; attorney's fees and costs; damages

[First paragraph applicable to claims pending on and arising after November 5, 2002. See 2002, 223, Sec. 4.]

Section 9. This chapter shall be construed liberally for the accomplishment of its purposes, and any law inconsistent with any provision of this chapter shall not apply, but nothing contained in this chapter shall be deemed to repeal any provision of any other law of this commonwealth relating to discrimination; but, as to acts declared unlawful by section 4, the administrative procedure provided in this chapter under section 5 shall, while pending, be exclusive; and the final determination on the merits shall exclude any other civil action, based on the same grievance of the individual concerned.

Any person claiming to be aggrieved by a practice made unlawful under this chapter or under chapter one hundred and fifty-one C, or by any other unlawful practice within the jurisdiction of the commission, may, at the expiration of ninety days after the filing of a complaint with the commission, or sooner if a commissioner assents in writing, but not later than three years after the alleged unlawful practice occurred, bring a civil action for damages or injunctive relief or both in the superior or probate court for the county in which the alleged unlawful practice occurred or in the housing court within whose district the alleged unlawful practice occurred if the unlawful practice involves residential housing. The petitioner shall notify the commission of the filing of the action, and any complaint before the commission shall then be dismissed without prejudice, and the petitioner

shall be barred from subsequently bringing a complaint on the same matter before the commission. Any person claiming to be aggrieved by an unlawful practice relative to housing under this chapter, but who has not filed a complaint pursuant to section five, may commence a civil action in the superior or probate court for the county in which the alleged unlawful practice occurred or in the housing court within whose district the alleged unlawful practice occurred; provided, however, that such action shall not be commenced later than one year after the alleged unlawful practice has occurred. An aggrieved person may also seek temporary injunctive relief in the superior, housing or probate court within such county at any time to prevent irreparable injury during the pendency of or prior to the filing of a complaint with the commission.

An action filed pursuant to this section shall be advanced for a speedy trial at the request of the petitioner. If the court finds for the petitioner, it may award the petitioner actual and punitive damages. If the court finds for the petitioner it shall, in addition to any other relief and irrespective of the amount in controversy, award the petitioner reasonable attorney's fees and costs unless special circumstances would render such an award unjust. The commission shall, upon the filing of any complaint with it, notify the aggrieved person of his rights under this section.

Any person claiming to be aggrieved by a practice concerning age discrimination in employment made unlawful by section four may bring a civil action under this section for damages or injunctive relief, or both, and shall be entitled to a trial by jury on any issue of fact in an action for damages regardless of whether equitable relief is sought by a party in such action. If the court finds for the petitioner, recovery shall be in the amount of actual damages; or up to

three, but not less than two, times such amount if the court finds that the act or practice complained of was committed with knowledge, or reason to know, that such act or practice violated the provisions of said section four. The provisions set forth in the first, second and third paragraphs shall be applicable to such complaint or action to the extent that such provisions do not conflict with the provisions set forth in this paragraph.

APPENDIX G

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

A.C. 2003-J-189
(Bristol Superior Court)
#: BRCV2002-01427)

STONEHILL COLLEGE

vs.

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION and SOO TANG TAN

ORDER

The petition for relief brought pursuant to G.L.c. 231, §118 (1st para.) is denied. The petitioner, Stonehill College, is granted leave to appeal the order of the Superior Court, dated March 20, 2003, compelling an election of remedies. Stonehill College is to file its notice of appeal with the Superior Court on or before May 14, 2003. Upon receipt of the notice of assembly of the record and docketing of the appeal with this Court, the parties are advised to file a motion to expedite the appeal.

By the Court, (Perretta, J.)

/s/

Assistant Clerk

Entered: May 8, 2003

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS.

SUPERIOR COURT
CIVIL ACTION
BRCV2002-01427

STONEHILL COLLEGE,
Plaintiff

V.

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION and SOO TANG TAN

MEMORANDUM OF DECISION AND ORDER

The defendant Soo Tang Tan (Tan) is a professor at Stonehill College. He commenced an action at the Massachusetts Commission Against Discrimination (MCAD). After a finding of probable cause came in that forum, Tan did not exercise his option of instituting an action in the Superior Court. Instead, he pursued his claim to a conclusion in the MCAD. A finding in his favor by the hearing officer was upheld by the full commission. Plaintiff Stonehill College (Stonehill) then commenced this action in the Superior Court. In the two-count complaint, Stonehill seeks a G.L. c. 30A review of the MCAD findings (Count I) and a *de novo* trial, before a jury, on the issue of whether there was a violation of G.L. c. 151B (Count II).

Tan now moves to dismiss Stonehill's claim for trial by jury on the merits of Tan's claim and argues that Stonehill's sole remedy is to have the Superior Court conduct a judicial review only on the MCAD record (G.L. c. 151B, § 6). Tan also argues that (1) the doctrines of *res judicata*, issue preclusion, and collateral estoppel bar relitigation of the issues, and (2) whatever right to a jury trial Stonehill may have, it only extends to the question as to the proper amount of damages for emotional distress. Stonehill, in

objecting to the motion to dismiss, reasserts its contention that it is entitled to a G.L. c. 30A review of the MCAD record, and if it does not prevail, then a jury trial as to all issues.

The claim by Tan that the doctrines, collectively known as issue preclusion, bar a jury trial on the issues is not well founded. Although, as Tan contends, a final decision of the MCAD is entitled to preclusive effect, the present decision is not final. G.L. c. 151B specifically provides for further review by the Superior Court of the MCAD decision. The MCAD decision is not final in the sense that it provides a basis for the application of issue preclusion. Sena v. Commonwealth, 417 Mass. 250, 260 (1994).

As to the contention of Tan that any right to trial by jury is limited to a reassessment of the amount of damages awarded by reason of emotional distress, the court rules that the right to trial by jury encompasses all issues. In Lavelle v. MCAD, 426 Mass. 332, 335 n.5 (1997), the Supreme Judicial Court noted that a jury trial is available unless a complainant solely seeks equitable relief. That court further made it clear that most, if not all, monetary damages that may be awarded pursuant to G.L. c. 151B go beyond traditional areas of equity. Despite Tan's contention to the contrary, the court did not hold that awards of back pay are equitable, it said that "perhaps" they may be. Id. at 337. Since Tan's recoveries were essentially legal in nature, as distinguished from equitable, Stonehill has a constitutional right to trial by jury on all issues of liability and damages pursuant to Article 15 of the Massachusetts Constitution and the Fourteenth and Seventh Amendments of the United States Constitution.

Justice William Young, formerly a justice of the Superior Court and now Chief Justice for the Federal Court, District of Massachusetts, authored a brilliant and exhaustive decision regarding the right to trial by jury in the face of arguments that a statute is

restitutional. In re: Acushnet River and New Bedford Harbor: Proceedings Re Alleged PCB Pollution, 712 F. Supp. 994 (D. Mass. 1989).

Among the points discussed were that "[t]he Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action" and that the right to jury trial is "inviolate even though the legal issues in a case might be characterized as 'incidental' to equitable issues." Id. at 998. It was noted that "[w]here a money judgment is sought, the action is very frequently one to enforce legal rights." Id. at 1000, citing Dairy Queen, Inc. v. Wood, 369 U.S. 469, 476 (1962). Of particular significance to actions under G.L. c. 151B, was the recognition, citing Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-511 (1959), that where an issue is common to both legal and equitable claims, any equitable action by the court must await the jury's verdict. Id. at 998.

The import of the foregoing analysis is that the plaintiff is seeking an award of money damages, including an award for emotional distress. It cannot be maintained in good faith that an action for damages resulting from infliction of emotional distress is not a matter in which a party has, as a matter of constitutional law, a right to trial by jury. The asserted facts which would cause relief to be granted with respect to the emotional distress claim are common to all claims. Even if the claim for infliction of emotional distress was the only "legal" issue involved, resolution of that issue must be by a jury, and any equitable relief granted cannot contradict the jury's determination. Thus, Stonehill is entitled to a trial by jury on all issues.

The remaining issue is whether Stonehill is entitled to both a G.L. c. 30A review based on the MCAD record, and if that is not successful, a jury trial on all issues. In substance, Stonehill is claiming that it should get "three bites of the apple." They are: (1) an

opportunity to prevail on the merits before the MCAD; (2) to succeed on a G.L. c. 30A review of the MCAD record; and (3) a trial by jury if otherwise unsuccessful. The Supreme Judicial Court seems to have foreseen this issue. After determining that a respondent's right to a jury trial may only be exercised after an MCAD decision, the court discussed the various events that obviate the necessity of a jury trial, such as a finding for the respondent or the granting of solely equitable relief. The court then stated:

> Additionally, an unsuccessful respondent may conclude that an appeal based on the agency record (G.L. c. 151B, § 6) provides an adequate avenue of relief from the agency decision. We adopt this solution recognizing that it gives certain respondents two chances to prevail, before the commission and then in court, while a complainant unsuccessful before the commission may not proceed to court for a new hearing (G.L. c. 151B, § 9, first par.), but may seek judicial review only on the agency record (G.L. c. 151B, § 6).

Lavelle, 426 Mass. at 338.

Thus, the court stated that a respondent gets two opportunities to prevail. One is a full adjudicatory hearing on the merits before the MCAD, the other is a full adjudicatory hearing in the Superior Court. The Supreme Judicial Court distinguishes a respondent's rights from the plaintiff's position, which only provides for one adjudicatory hearing and then a limited review on the record. Nowhere does that court even imply that a respondent gets three chances to prevail. Also, the language that an unsuccessful respondent may conclude that a 30A appeal provides adequate relief

indicates that respondents, such as Stonehill, must elect between a G.L. c. 30A appeal and a claim for a jury trial on all issues.

ORDER

The court rules that the motion to dismiss is **DENIED.** Stonehill is to file within 30 days of this order an election as to whether it will seek relief pursuant to G.L. c. 30A or whether it seeks a jury trial on the issues.

/s/
David A. McLaughlin
Justice of the Superior Court

DATED: March 20, 2003

A True Copy By Photostatic Process
Attest:
/s/
Asst. Clerk of Courts

APPENDIX H

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT
CIVIL ACTION
No. 02-2671

WILFERT BROTHERS REALTY CO.,
Plaintiffs,

VS.

COMMONWEALTH OF MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION and DAVID KEELING,
Defendants.

REPORT OF INTERLOCUTORY ORDER OF THE APPEALS COURT

Plaintiff Wilfert Brother Realty Co. ("Wilfert"), seeks relief from a decision by defendant Massachusetts Commission Against Discrimination (the MCAD) in an action brought by David Keeling. Keeling was formerly an employee of Wilfert. Keeling, the complainant before the MCAD, sought and obtained relief at the MCAD in the form of damages and attorney's fees on his claim that he suffered employment discrimination by Wilfert on the basis of Keeling's disability. The MCAD Full Commission affirmed the decision of the MCAD Hearing Officer in favor of Keeling.

Wilfert maintains that it is entitled to a jury trial under Lavelle v. MCAD, 426 Mass. 332 (1997). Keeling contends that Wilfert waived its right to a jury trial, because its jury claim was raised after the MCAD Public Hearing (but before the full Commission affirmed the decision) and more than three years after the alleged discrimination at issue.

On April 23, 2003, this Court issued a decision in favor of Wilfert, finding that it had not waived its right to a jury trial. Wilfert Brothers Realty Co. v. MCAD and Keeling Memorandum of Decision and Order ("The Decision") on defendant Commonwealth of Massachusetts Commission Against Discrimination's Motion to Dismiss and Defendant David Keeling's Motion to Strike Plaintiff's Claim for a Jury Trial, C.A. No. 02-2671, Middlesex, ss., April 23, 2003. The Decision is attached.

Because the question addressed in the Decision is of substantial importance to the parties and this court, because both Wilfert and Keeling have requested I report my order and because the legal issue is not free from doubt, I exercise my discretion to report this interlocutory order to the Appeals Court under Mass. R. Civ. P. 64. Footnote 1 of the Decision notes that various Superior Court decisions offer differing guidance on the issue of Lavelle waiver.

The issue of Lavelle waiver is a matter that strongly affects the outcome of this case and determines the fundamental shape of future proceedings, i.e., either a Chapter 30A appeal or a jury trial. If a jury trial occurs in this court, and my decision on Lavelle waiver is later reversed on appeal, there will be substantial wasted time, resources and effort on the part of the parties, jurors and the court. Thus, it is in the interests of all parties, including the trial court, that proceedings commence on the correct track. Thus, reporting the issue on an interlocutory basis will preserve resources and prevent potentially duplicative and improper proceedings.

The precise question I report is as follows:

> **Did Wilfert Brothers Realty Co. waive its right to a jury trial by not asserting its claim until after the decision of the MCAD hearing officer but before the Full Commission**

affirmed that decision, when the decision was issued more than three years after the claim arose?

CONCLUSION

Because this court's decision of April 23, 2003 involves a current and important question of law not previously decided by our appellate courts, and because that question "so affects the merits of the controversy that the matter ought to be determined by the appeals court before any further proceedings in the trial court,"[1] I report the correctness of my attached April 23, 2003 memorandum of decision and order to the Appeals Court. I designate defendant David Keeling as the appellant for purposes of this report.

/s/
Margaret R. Hinkle
Justice of the Superior Court

Dated: April 30, 2003

A:\Wilfert v. Commonwealth.wpd

Entered on docket & copies mailed 5/6/2003

[1] G.L. c. 231, § 111, second par., Mass. R. Civ. P. 64

APPENDIX I

COMMONWEALTH OF MASSACHUSETTS

DUKES, ss. SUPERIOR COURT
CIVIL ACTION
NO. 02-00022

KEYLAND CORPORATION & another[1]

vs.

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION & another[2]

REPORT OF INTERLOCUTORY ORDER TO THE APPEALS COURT

The plaintiffs, John Kheary ("Kheary") and Keyland Corporation ("Keyland"), seek relief from the award of damages to the defendant, Brenda Raffurty ("Raffurty"), by the Massachusetts Commission Against Discrimination (the "MCAD") for violations of G.L. c. 151B. The plaintiffs argue that there [*sic*] are entitled to a jury trial under Lavelle v. MCAD, 426 Mass. 332 (1997) (hereafter "Lavelle"). The defendant contends that the plaintiffs waived their right to a jury trial because the jury claim was raised after the MCAD Public Hearing (but before the full Commission affirmed the decision) and more than three years after the alleged discrimination at issue.

Also raised was the issue of whether the jury trial is *de novo* or a jury review of the MCAD decision. Raffurty contends that the MCAD's decisions and opinions should be admissible as *prima facie* evidence of discrimination and that the burden should be on

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[1] John Kheary
[2] Brenda Raffurty

the plaintiffs to establish they did not discriminate against her.

On May 30, 2003, this court issued a decision in favor of the plaintiffs, finding that it had not waived its right to a jury trial and that the trial is *de novo.* Keyland Corporation v. MCAD, Memorandum of Decision and Order (the "Decision") on Defendant Brenda Raffurty's Motion to Dismiss Plaintiff's Claim for Trial by Jury, C.A. No. 02-00022, Dukes, ss., May 30, 2003. The Decision is attached.

Because these questions addressed in the Decision are of substantial importance to the parties and this court, and because the legal issues are not free from doubt,[3] I exercise my discretion to report this interlocutory order to the Appeals Court under Mass. R. Civ. P. 64. If a *de novo* jury trial occurs and the court's decision on Lavelle waiver is later reversed on appeal, there will be substantial wasted time, resources and effort on the part of the parties, jurors

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[3] With respect to the issue of waiver, although there is some Superior Court precedent, there appears to be no appellate authority on point. Superior Court cases include: Westinghouse Electric Supply v. MCAD, 8 Mass. L. Rptr. No. 14, 324 (Civil No. 97-426-E, Suffolk Super. Ct. March 30, 1998) (Lauriat, J.), which held that a respondent who claimed a jury trial after a decision by the Full Commission of MCAD "should have asserted its jury claim at the MCAD"; Northeast Security, Inc. v. MCAD, Civil No. 98-4753-B (Suffolk Super. Ct. Sept. 14, 2000) (Doerfer, J.), which held that a respondent who claimed a jury trial after a decision of the Full Commission was not required to assert its right while the MCAD decision was pending; and Northeast Battery & Alternator v. Lawless, 2002 Mass. Super LEXIS 552, * (Worcester Super Ct. Jan. 7, 2003) (Velis, J.), which held that "the defendant must preserve [its jury trial right] before MCAD has taken final action [and] it must notify MCAD and the plaintiff in writing before MCAD holds a public hearing on the matter." The court is currently facing the identical issue in Wilfert Brothers Realty Co. v. MCAD, Civil No. 02-2671 (Middlesex Sup. Ct. April 23, 2003) (Hinkle, J.), which has been reported to the appeals court pursuant to Mass. R. Civ. P. 64.

With respect to the issue of the scope of the respondent's right to a jury trial, the court is unaware of any reported decisions.

and the court. Thus, it is in the interests of all parties, including the trial court, that proceedings commence on the correct track. Accordingly, reporting the issue on an interlocutory basis will preserve resources and prevent potentially duplicative and improper proceedings.

The precise questions I report are as follows:

1. **Did Kheary and Keyland waive their right to a jury trial by not asserting their claim until after the decision of the MCAD Hearing Officer, but before the Full Commission affirmed that decision, when the decision was issued more than three years after the claim arose?**

2. **If Kheary and Keyland did not waive their right to a jury trial, is the trial *de novo*? Specifically:**
   a) **Does the defendant (the complainant in previous MCAD hearing) have the burden of proof?**
   b) **Is the MCAD's decision admissible?**
   c) **Is discovery warranted?**
   d) **Does the MCAD have a right to intervene?**

CONCLUSION

Because this court's decision of May 30, 2003, involves current and important questions of law not previously decided by our appellate courts, and because the questions "so affect[s] the merits of the controversy that the matter ought to be determined by the appeals court before any further proceedings in

the trial court,"[4] I report the correctness of my attached May 30, 2003 memorandum of decision and order to the Appeals Court. I designate defendant Brenda Raffurty as the appellant for purposes of this report.

/s/
Charles Spurlock
Justice of the Superior Court

Dated: May 30, 2003

[4] Massachusetts General Laws c. 231, § 111, second par.; Mass. R. Civ. P. 64

APPENDIX J

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
C.A. NO. 02-00880

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

v.

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION and GERALDINE ROSS

MEMORANDUM OF DECISION AND REPORT OF INTERLOCUTORY ORDER TO THE APPEALS COURT

INTRODUCTION

This is a civil action filed by the plaintiff, Massachusetts Bay Transportation Authority ("MBTA"), seeking relief from a decision by the defendant Massachusetts Commission Against Discrimination ("MCAD") in an action brought by the defendant Geraldine Ross ("Ross"). Ross sought and obtained relief in the form of damages, equitable relief and attorneys' fees based on a claim that she suffered unlawful discrimination by the MBTA on the basis of her disability. The plaintiff MBTA maintains that it is entitled to a de novo jury trial under one of several theories or, in the alternative, to judicial review under G.L. c. 30A. The defendants MCAD and Ross counter that the MBTA, as a governmental respondent, should be deemed to have waived its right to trial by jury based on the view expressed by the Supreme Judicial

Court in *Lavelle v. MCAD*, 426 Mass. 332, 337 n. 8 (1997).

After hearing, the court's decision is that the MBTA does not have a right to trial by jury under the circumstances of this case. Thus, I allow the defendants' motions to dismiss count one of the plaintiff's complaint under Mass. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. Because the question is of substantial importance to the parties and this court, and in view of the fact that the parties have requested a report and the legal issue is not free from doubt[1], I exercise my discretion to report this interlocutory order to the Appeals Court under Mass. R. Civ. P. 64. The precise question I report is as follows:

In a proceeding under G.L. c. 151B, does a governmental respondent like the MBTA have a right to trial by jury when the complainant does not elect a judicial determination of her claim?[2]

BACKGROUND

The essential facts are not in dispute. The defendant Ross began working for the MBTA as a part time bus operator in 1985 or 1986. She injured her back while working on the job in 1987 and was unable to perform the essential functions of her job. She began to collect Worker's Compensation Benefits. However, in 1987, she agreed to perform the duties of a part time collector on a rapid surface line, and continued to work in that capacity until she filed her complaint with MCAD. In 1990, the MBTA medical

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[1] In another case involving two of the same parties, *MCAD v. MBTA*, Suffolk Superior Court No. 01-2574G, the court (Ball. J.) has reported a similar question to the Appeals Court. That case has been briefed and is awaiting argument.

[2] In order to facilitate the expeditious determination of the case by an appellate court, I order that the plaintiff MBTA assume the responsibility of the appellant.

staff permanently disqualified her from working as a bus driver due to her back injury. The thrust of defendant Ross's complaint is that the MBTA has acted unlawfully by involuntarily conning her to a permanent part time position as a collector and, as a result, she has not accrued seniority toward a position as a full time collector. She alleges that other persons hired as part time collectors after her have advanced to the position of full time collector, and that she has been discriminated against on account of her disability because the MBTA takes the position that she can never qualify for a full time position as a collector solely because she is a permanently disqualified part time bus operator to the Superior Court in accordance with Superior Court Standing Order 1-96.

In 1994, Ross simultaneously filed claims of discrimination against the MBTA with the MCAD and the federal Equal Opportunity Employment Commission. Ross did not remove her state law claim to the Superior Court within three years of its filing and thus waived her right to trial by jury. See G.L. c. 151B, § 9. MCAD found probable cause to credit her complaint in 1996. Following a three day trial, an MCAD hearing officer ruled that the MBTA had violated Ross's rights under G.L. c. 151B, § 4(16). See MBTA's Complaint, Exhibit D (decision of the hearing officer). The Hearing Officer ruled that the defendant Ross was entitled to a monetary award of lost wages, damages for emotional distress, as well as equitable relief. The MBTA filed a timely request for review by the whole Commission. In January, 2002, the full Commission of the MCAD affirmed the hearing officer's findings of discrimination. See MBTA's Complaint, Exhibit E (Full Commission decision). The full commission affirmed the award of damages for lost pay and emotional distress, added damages for "front pay," and modified the award of attorneys' fees.

Thereafter, on February 26, 2002, the MBTA filed suit in the United States District Court for the District of Massachusetts seeking a de novo jury trial or, in the alternative, judicial review of the Commission's decision under G.L. c. 30A, § 14. The following day, the MBTA filed this action requesting the same relief.

DISCUSSION

When a person files a complaint with the MCAD seeking redress for unlawful discrimination, such as discrimination against a "qualified handicapped person," G.L. c. 151B, §§ 1(16) & 4(16), and elects not to remove the case to the Superior Court under G.L. c. 151B, § 9, the statute makes no provision for a jury trial on the part of either the complainant or the respondent.[3] When, in a case such as this, the Commission rules in favor of the complainant, an aggrieved respondent like the MBTA is limited by the statute to judicial review before the Superior Court under the administrative procedure act. G.L. c. 151B, § 6. "The Commission does not conduct jury trials, and judicial consideration of a commission decision is limited to review of the agency record pursuant to the standards set forth in § 14(7) of the administrative procedure act, G.L. c. 30A." *Lavelle v. Massachusetts Commission Against Discrimination,* 426 Mass. 332, 334 (1997).

In *Lavelle,* the respondent asserted a constitutional right to a jury trial prior to a final determination by the MCAD of the complainant's case. The Supreme Judicial Court acknowledged that he had a right to

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[3] It has previously been determined that a plaintiff who files a civil action in the Superior Court alleging a violation of G.L. c. 151B in which the relief sought is not primarily equitable in nature *e.g.*, compensatory damages, interest and costs, attorneys' fees and reinstatement, has a right to trial by jury under Article 15 of the Massachusetts Declaration of Rights. *See Dalis v. Buyer Advertising, Inc.*, 418 Mass. 220 (1994).

know whether he had a right to a jury trial so that he could make an intelligent decision about how to proceed. *Id.* at 335. The court reasoned that although some differences in the way in which complainants and respondents are treated under G.L. c. 151B are permitted as matters left to the discretion of the Legislature, *see New York & Mass. Motor Serv., Inc. v. Massachusetts Comm'n Against Discrimination*, 401 Mass. 566 (1988)(Fact that complainant but not respondent can terminate MCAD proceeding and go to court is not a violation of Equal Protection), the loss of the right to trial by jury, when applicable, would be a deprivation of a fundamental constitutional right that "cannot be justified." *Id.* at 337.

The first inquiry faced by the court in *Lavelle* was whether the nature of the claim brought by complainant was such that the right to trial by jury under Article 15 of the Declaration of Rights[4] was applicable. The determinative consideration is whether the relief sought by the complainant was entirely equitable in nature. In *Lavelle*, it was not clear what relief was sought by the complainant. In the present case, on the other hand, it is plain that the complainant sought and was awarded damages like those awarded in common law tort or contract actions, and thus enjoyed a right to trial by jury under Article 15. *Accord, Rosati v. Boston Pipe Covering* [sic], *Inc.*, 434 Mass. 349, 351 (2001). The second inquiry was whether there was any basis to differentiate between the position of the complainant and the respondent. It is here that we find the nub of the dispute in this case. In *Lavelle*, the Supreme Judicial Court stated

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[4] Article 15 of the Massachusetts Declaration of Rights provides that "[I]n all controversies concerning property, and in all suits before two or more persons, except in cases in which it has heretofore been otherways used and practised, the parties have a right to a trial by jury; and this method shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it."

that "If one side to a dispute has a constitutional right to jury trial, generally the other side must have a similar right. We are dealing here with a fundamental right (art. 15 says the right is sacred), and differing treatment of complainants and respondents in respect to the availability of that fundamental right, unlike the differences in the *Motor Service* case, cannot be justified." *Lavelle*, 426 Mass. at 337. However, the court qualified this textual expression of parity between the constitutional right to trial by jury enjoyed by complainants and respondents with the following footnote:

> "A governmental respondent's right to a jury trial, if any, has implicitly been waived in G.L. c. 151B, at least where a complainant does not elect a judicial determination of her claim."

Lavelle, 426 Mass. at 337 n. 8.

The principal argument advanced by the MBTA in support of its position that footnote 8 in *Lavelle* is not controlling or does not mean what it says is that apart from the terms of the statute, it enjoys a right to trial by jury under Article 15 of the Massachusetts Declaration of Rights. By implication, this is a challenge to the constitutionality of G.L. c. 151B, § 9 (only complainants are permitted to remove case to Superior Court) that, in the context of private individuals, the Supreme Judicial Court found in need of constitutionally based augmentation in *Lavelle*. However, this claim is foreclosed because the Supreme Judicial Court has held that the MBTA, as a governmental entity, lacks standing, in most circumstances, to challenge the constitutionality of state statutes. *See MBTA v. Auditor of the Commonwealth*, 430 Mass. 783, 793 (2000).

Even apart from the question of standing, the MBTA's argument that Article 15 of the Massachusetts

Declaration of Rights grants it the same right to trial by jury as defendant Ross falls short. The question cannot be answered simply by reference to judicial statements that the right to a jury trial guaranteed by Article 15 is "sacred," *Wynn & Wynn, P.C. v. MCAD,* 431 Mass. 655, 664 (2000), or subject only to the "narrowly defined" exception set forth in its text ("except in cases in which it has heretofore been otherways used and practiced"). *Rosati v. Boston Pipe Covering, Inc.*, 434 Mass. 349, 350 (2001). *See also* Mass. R. Civ. P. 38(a)(right of trial by jury "shall be preserved to the parties inviolate").

The pivotal question is whether the MBTA is a "person." In *Spence v. Boston Housing Authority,* 390 Mass. 604 (1983), the Supreme Judicial Court considered whether the Boston Housing Authority ("BHA") could assert rights assigned to "persons," "citizens," or "individuals" under various provisions of the state and federal constitutions as well as federal statutes. There the BHA, which was described as a "public body politic and corporate" entity, see G.L. c. 121B, § 3, sought to litigate constitutionally based challenges to electricity rates established by the state Department of Public Utilities and electricity charges assessed by Boston Edison Company. Although the Court acknowledged that the BHA had some of the characteristics of a private corporation and was independent of the Commonwealth and the city or town in which it operates, it "is basically a governmental entity." *Spence,* 390 Mass. at 607. The Court then invoked a doctrine of federal constitutional law that a municipality does not enjoy the constitutional guarantees of equal protection or due process. *Id., quoting Newark v. New Jersey,* 262 U.S. 192, 193 (1923)(City cannot invoke the protection of the Fourteenth Amendment against a state).[5] In

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[5] This doctrine appears to be derived from the distinction between the state's power to regulate private versus public corporations. *See Trustees of Dartmouth College v. Woodward,* 17

Spence the court went on to explain that although a governmental entity such as the MBTA may be a "person" for purposes of liability, *id.* at 609 *citing Monell v. Department of Social Services of the City of N.Y.*, 436 U.S. 658 (1978) and *United States v. MBTA*, 614 F.2d 27 (1st Cir. 1980), that does not mean that it is a person when it brings a law suit on the basis of a constitutional claim such as trial by jury.

As the defendant Ross points out in her brief, "[w]hen construing the term 'person' for purposes of the state constitution, Massachusetts courts typically exclude governmental entities from that definition." Defendant Ross' Reply to Opposition to Defendant Ross' Motion to Dismiss at 3-4 *citing Clean Harbors of Braintree, Inc. v. Board of Health of Braintree*, 415 Mass. 876, 878 (1993); *Brookline v. The Governor*, 407 Mass. 377, 386 (1990); *Trustees of Worcester State Hospital v. The Governor*, 395 Mass. 377, 380 (1985). *See also Commonwealth v. Dowd*, 37 Mass. App. Ct. 164 (1994)(Term "person" ordinarily does not include the state or any of its subdivisions).

The MBTA suggests that it should be treated like a private corporation and not a governmental entity because it is independent of the Executive Branch. However, the analogy it draws to the status of the Massachusetts Turnpike Authority, *see Levy v. Governor*, 436 Mass. 736, 749 (2002), adds nothing to its case because the MBTA is still is a governmental entity created by the Legislature. *See MBTA v. Auditor of the Commonwealth*, 430 Mass. 783, 793 (2000). Also, the mere fact that the MBTA is omitted from the limitation on liability applicable to certain other government entities under the Massachusetts Tort Claims Act, G.L. c. 258A simply represents a greater waiver of sovereign immunity by the Commonwealth

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U.S. (4 Wheat.) 518 (1819). *See, e.g., Housing Authority of Kau Tribe of Indians of Oklahoma v. City of Ponca City*, 952 F.2d 1183, 1189-90 (1998); *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500 (6th Cir. 1986).

than is the case when the party sued is a state agency or municipality.

The remaining arguments are tangential to the constitutional claim raised by the plaintiff and need no further discussion.

ORDER

For the above reasons, the defendants' motions to dismiss count one of the plaintiff's complaint are ALLOWED. However, because the court's decision involves a current and important question of law not previously decided by our appellate courts and because that question "so affects the merits of the controversy that the matter ought to be determined by the appeals court before any further proceedings in the trial court," G.L. c. 231, § 111, second para. and Mass. R. Civ. P. 64, I am reporting the correctness of this interlocutory order to the Appeals Court. I designate the MBTA as the appellant for purposes of this report. Meanwhile, in order to facilitate the administrative review process that will follow if the interlocutory order is affirmed, I further order the parties to take the necessary steps to assemble and transmit the administrative record to the Superior Court. See Superior Court Standing Order 1-96.

/s/
Peter W. Agnes, Jr.
Justice of the Superior Court

DATE: February 19, 2003

APPENDIX K

426 Mass. 332-340 (1997)

JAMES LAVELLE *vs.* MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION & others.[1]

Hampden. September 8, 1997. - December 23, 1997.

Present: WILKINS, C.J., ABRAMS, LYNCH, GREANEY, FRIED, MARSHALL, & IRELAND, JJ.

Massachusetts Commission Against Discrimination. Administrative Law, Judicial review. *Practice, Civil,* Jury trial. *Common Law. Constitutional Law,* Trial by jury, Sex discrimination, Equal protection of laws. *Jury and Jurors. Anti-Discrimination Law,* Sex, Employee. *Employment,* Discrimination.

A respondent, named in a complaint of sex discrimination seeking more than equitable relief and filed with the Massachusetts Commission Against Discrimination, is entitled, after the commission has taken final action, to a jury trial in a judicial determination of the discrimination claim, pursuant to art. 15 of the Massachusetts Declaration of Rights and principles stated *in Dalis* v. *Buyer Advertising, Inc.,* 418 Mass. 220 (1994), and pursuant to his right to equal protection of the law. [334-339] LYNCH, J., concurring.

CIVIL ACTION commenced in the Superior Court Department on July 8, 1996.

The case was heard by *Judd J. Carhart, J.,* on a motion to dismiss.

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[1] Joan F. Hash, city of Holyoke, and Holyoke Gas & Electric Department. Only the plaintiff and the defendant commission have filed briefs in this appeal.

The Supreme Judicial Court granted an application for direct appellate review.

John F. Moriarty for the plaintiff.

Thomas O. Bean, Assistant Attorney General, for Massachusetts Commission Against Discrimination.

The following submitted briefs for amici curiae:

James M. Paulson, Robert P. Morris & Patricia Lim for Associated Industries of Massachusetts.

Seymour Weinstein & Karen L. Stern for Jewish Nursing Home Center, Inc.

Jane K. Alper, Nan Myerson Evans & Wendy A. Kaplan for the National Employment Lawyers Association & another.

WILKINS, C.J. In *Dalis* v. *Buyer Advertising, Inc.*, 418 Mass. 220 (1994) *(Dalis)*, this court held that a plaintiff alleging gender-based discrimination in a judicial proceeding was entitled, as a matter of State constitutional right, to a trial by jury. Cf. *MacCormack* v. *Boston Edison Co.*, 423 Mass. 652, 655 (1996) (claimant asserting unlawful retaliation has right to jury trial); *Whalen* v. *NYNEX Info. Resources Co.*, 419 Mass. 792, 795 (1995) (same for person asserting handicap discrimination). We concluded that art. 15 of the Massachusetts Declaration of Rights applied to the plaintiff's sex discrimination claim because that action was analogous to common law actions sounding in tort and contract. *Dalis, supra* at 223. Article 15, which is set forth in full in the margin,[2] preserves the common law trial by jury in its indispensable aspects as it was known at the time our Constitution was adopted. *Department of Revenue* v. *Jarvenpaa*, 404 Mass. 177, 185-186 (1989). Unless

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[2] "In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used, and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it."

a dispute brought to court is one that a court would have decided in 1780 without a jury, art. 15 prescribes the right to a trial by jury as a sacred procedure for resolving the case. *Dalis, supra* at 222.

The plaintiff in this case (Lavelle) is a respondent named in a complaint of sex discrimination filed with the Massachusetts Commission Against Discrimination (commission) by Joan F. Hash (complainant).[3] Lavelle brought this action asserting, pursuant to art. 15 principles stated in our *Dalis* opinion and pursuant to his right to equal protection of the law, that he is entitled to a jury trial in a judicial determination of the complainant's discrimination claim. On motion of the commission, a judge in the Superior Court dismissed the complaint, but only on the ground that, because Lavelle had not exhausted his rights before the commission, the action was premature.[4]

We set forth the facts alleged in the complaint and, therefore, admitted by the motion to dismiss. Lavelle was a commissioner of the Holyoke Gas & Electric Department (department). The complainant, a customer account clerk in the department, filed a complaint, later amended, alleging that she was subjected to unlawful sex discrimination on August 14, 1993, in violation of G.L. c. 151B, § 4. Although the complaint does not say so, it seems likely that Lavelle was the person who committed the alleged discriminatory conduct. Approximately two years later, the commission notified Lavelle, the city, and the department that it had found probable cause to conclude that unlawful discrimination had occurred.

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[3] Other respondents are Holyoke and its gas and electric department.

[4] The commission based its motion to dismiss solely on an assertion that Lavelle had no right to a jury trial. It was apparently willing to face the issue on the allegations of the complaint because it did not raise the claim of exhaustion of administrative remedies in its motion.

The commission scheduled a conciliation conference for May 15, 1996. Before the conference was held, Lavelle notified the commission that he wished to have a judicial determination of the discrimination complaint, that he was entitled to a jury trial, and that the right granted by G.L. c. 151B only to a complainant to obtain a jury trial denied him equal protection of the law. The commission did not respond to Lavelle. This action was commenced on July 8, 1996. The commission promptly filed a motion to dismiss which a Superior Court judge allowed because proceedings before the commission, which might produce a result favorable to Lavelle, had not been concluded. We granted Lavelle's application for direct appellate review of his appeal.

As we have said, the judge allowed the commission's motion to dismiss without prejudice on the ground that Lavelle had not shown that he had yet been aggrieved, even assuming that he had a right to a jury trial. The judge indicated that Lavelle could raise the absence of a right to a jury trial if, after completion of the commission's proceedings, he were to be aggrieved by the agency's decision. Lavelle points out that neither the proceedings before the commission nor the judicial review of a commission decision adverse to him would provide him with a jury trial. The commission does not conduct jury trials, and judicial consideration of a commission decision is limited to review of the agency record pursuant to the standards set forth in § 14 (7) of the administrative procedure act, G.L. c. 30A. See G.L. c. 151B, § 6.

If G.L. c. 151B provided that, following a commission decision adverse to him, Lavelle could obtain a jury trial on issues raised by the complainant and decided against him, we would agree that a claim of a right to a jury trial before conclusion of the agency proceedings would be premature. If, however, Lavelle is entitled to a jury trial, it may be that, to avoid a claim of waiver, he must assert that right

before the commission holds a hearing on the complaint, perhaps at the same point in the proceedings that G.L. c. 151B, § 9, permits a complainant to elect a judicial, rather than a commission, determination of the complaint. General Laws c. 151B says nothing explicitly about a respondent's right to a jury trial and implicitly indicates that a respondent has no such right. There is a controversy as to Lavelle's constitutional right to a jury trial. Lavelle is entitled to know now whether he has a constitutionally based right to a jury trial so that he may decide how to proceed in defense of his position and when to assert his right to a jury trial, if he has one. See *Rushworth* v. *Registrar of Motor Vehicles*, 413 Mass. 265, 268 n.4 (1992).

The commission urges us to refrain from deciding the constitutional question so that it might offer facts on remand that would, it claims, demonstrate that Lavelle's constitutional arguments should be rejected. These facts include the number of claims filed by unrepresented claimants, the volume of commission business, and the percentage of cases involving claims for damages below $25,000. These facts would not justify the denial to Lavelle of a constitutionally based right to a jury trial in the circumstances.

We start with the fact that a complainant has the right under G.L. c. 151B, § 9, to terminate agency proceedings and obtain a judicial determination of her claim.[5] If she asserts gender-based discrimination in a requested judicial proceeding, the Constitution of the Commonwealth grants her the right to a jury trial. *Dalis, supra.* On the other hand, a respondent has no right to elect a judicial determination of the claim, has

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[5] A complainant's right to obtain a judicial determination of her claim does not depend on whether she is seeking only equitable relief, that is, only relief that a court of equity could have traditionally granted. A complainant who seeks only equitable relief in a judicial determination of her claim would not be entitled to a jury trial.

only a right of a judicial review of agency action based on the record before the commission, and can only successfully claim a jury trial when a complainant elects a judicial determination of her claim.

These differences have led Lavelle to assert that the statutory scheme denies him equal protection of the law. [6]

In *New York & Mass. Motor Serv., Inc.* v. *Massachusetts Comm'n Against Discrimination,* 401 Mass. 566 (1988) *(Motor Service),* we rejected an employer's argument that certain differences in G.L. c. 151B, §§ 5 and 9, in the treatment of complainants and respondents deprived employers of a fundamental right and thus denied them the equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution. *Id.*, at 580-581. Among the differences that we held in the *Motor Service* case did not deprive an employer of equal protection with respect to a fundamental right was the right of a complainant to elect to go to court in lieu of having an agency determination, while an employer could not go to court until after final agency action. *Id.* at 579-581. The issue of a complainant's greater right to obtain a jury trial under G.L. c. 151B was not raised in the *Motor Service* case. The absence of that issue in the *Motor Service* case is understandable because this court did not identify the jury trial right of a complaining employee until six years later in its *Dalis* opinion.

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[6] Lavelle, for no apparent reason, rests his argument only on the Fourteenth Amendment to the Constitution of the United States. He makes a passing reference to art. 11 of the Massachusetts Declaration of Rights but does not argue that the differences in treatment additionally and separately violate equal protection rights set out in the Constitution of the Commonwealth. We have recognized equal protection of law principles in arts. 1, 6, 7, and 10 of the Massachusetts Declaration of Rights. See *Brest* v. *Commissioner of Ins.*, 270 Mass. 7, 14 (1930). Article 11 may also be involved. See *King* v. *Grace,* 293 Mass. 244, 246-247 (1936).

We learn from the *Motor Service* case that there is no denial of equal protection of the law simply because a complainant has the right to seek a judicial determination of her claim, bypassing the agency, and a respondent has no parallel right. If the complainant is seeking only equitable relief against Lavelle before the commission, she is advancing claims that would entitle neither Lavelle nor her to a trial by jury.[7] See *Demoulas* v. *Demoulas Super Mkts., Inc.*, 424 Mass. 501, 526 (1997), and cases cited. We do not know on this record, however, whether the complainant is seeking relief beyond injunctive and other traditionally equitable relief.

Although G.L. c. 151B, § 5, recites that the relief that the commission may grant is traditionally equitable in nature, the commission has authority to grant relief that goes beyond traditional areas of equity. The commission may award damages for emotional distress. See *Labonte* v. *Hutchins & Wheeler*, 424 Mass. 813, 824 (1997); *Bournewood Hosp., Inc.* v. *Massachusetts Comm'n Against Discrimination*, 371 Mass. 303, 316-317 (1976); *Buckley Nursing Home, Inc.* v. *Massachusetts Comm'n Against Discrimination*, 20 Mass. App. Ct. 172, 182 (1985). In appropriate circumstances, the commission may also award front pay, compensatory damages for loss of future earning capacity. See *Conway* v. *Electro. Switch Corp.*, 402 Mass. 385, 387-388 (1988). Damages for pain and suffering, emotional distress, and economic loss except perhaps back wages are not traditional forms of equitable relief and may not easily be treated as incidental to equitable relief. The question for us is whether, if the complainant is seeking more than equitable relief against Lavelle and she elects, as she has, not to seek a judicial determination of her claim, the fact that Lavelle does

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[7] The *Dalis* v. *Buyer Advertising, Inc.*, 418 Mass. 220 (1994), opinion assumed that the plaintiff was seeking damages that exceeded those traditionally available from a court of equity.

not have a statutory right to claim a jury trial at some stage in the proceedings denies him a constitutional right to a jury trial.

The reasoning of this court in its *Dalis* opinion identifying the constitutional right of a complainant to have a trial by jury applies equally to a respondent such as Lavelle. If one side to a dispute has a constitutional right to a jury trial, generally the other side must have a similar right.[8] We are dealing here with a fundamental right (art. 15 says the right is sacred), and differing treatment of complainants and respondents in respect to the availability of that fundamental right, unlike the differences in the *Motor Service* case, cannot be justified.

For this court to declare that Lavelle is entitled to a jury trial and to say no more would be unhelpful to the parties, to the commission, and to other persons with similar matters before the commission. We should deal with the consequences of our decision. Surely, it would be contrary to the purpose of the statute for us to declare the complainant's claim unenforceable because the statutory scheme does not grant Lavelle a right to seek a trial by jury. See G.L. c. 151B, § 10 (If the application of G.L. c. 151B "to any person or circumstance, shall, for any reason, be held invalid," the application of such provision to others shall not be affected thereby).

Lavelle must be given the right, in circumstances that we shall describe, to claim a jury trial. We must fashion a remedy that will be available to Lavelle, and to similarly situated respondents, until the Legislature, if it elects to do so, provides another solution.

We could direct that Lavelle has the same right that a complainant has under G.L. c. 151B, § 9, to elect a judicial determination, with a right to a jury trial.

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[8] A governmental respondent's right to a jury trial, if any, has implicitly been waived in G.L. c. 151B, at least where a complainant does not elect a judicial determination of her claim.

However, to do so would disregard the Legislature's decision that a complainant but not a respondent, may take a gender-based discrimination claim to court before the commission has acted on it. We are not compelled to adopt such a procedure because, as we have noted, differences in the treatment of complainants and respondents are permissible provided fundamental rights are not jeopardized. See *New York & Mass. Motor Serv., Inc.* v. *Massachusetts Comm'n Against Discrimination, supra* at 580.

A right in a respondent to obtain a jury trial only after the commission has taken final action is the best available option. In this way the commission will be involved in the matter as fully as possible and as the Legislature directed. Many disputes will be settled by the commission and will not need to be adjudicated. Persons representing themselves will not be forced into unfamiliar court surroundings but will be heard instead in less intimidating agency proceedings. Courts, in turn, will not be unnecessarily inundated with gender-based discrimination lawsuits demanded by respondents, perhaps in some instances for tactical reasons. Also, the commission may decide in favor of the respondent on the merits, thereby ending the matter. G.L. c. 151B, § 9, first par. Moreover, although the commission may decide in favor of the complainant, it might only grant traditional equitable relief. In such a case, a respondent would have no right to a jury trial. Additionally, an unsuccessful respondent may conclude that an appeal based on the agency record (G.L. c. 151B, § 6) provides an adequate avenue of relief from the agency decision. We adopt this solution recognizing that it gives certain respondents two chances to prevail, before the commission and then in court, while a complainant unsuccessful before the commission may not proceed to court for a new hearing (G.L. c. 151B, § 9, first par.), but may seek judicial review only on the agency record (G.L. c. 151B, § 6).

We also recognize that there will be practical problems in extending a jury trial right to a respondent, including the preparation of a complaint to be filed in court by or on behalf of a complainant. Other questions may arise concerning the process we have described, but we decline to anticipate and answer them now.

Any other solution must be left to the Legislature. If the statutory pattern granted neither party the right to elect a judicial determination of a gender-based employment discrimination case, no equal protection issue would be presented. An art. 15 issue concerning the absence of a jury trial right would remain. There is authority that would support the disposition of this kind of statutory discrimination claim in an administrative agency, with judicial review based only on the agency record. See *Department of Revenue* v. *Jarvenpaa*, 404 Mass. 177, 188 (1989); *Opinion of the Justices*, 309 Mass. 571, 601-602 (1941); *Opinion of the Justices*, 309 Mass. 562, 568 (1941). Cf. *Doherty v. Retirement Bd. of Medford*, 425 Mass. 130, 137 (1997); *Pernell* v. *Southall Realty*, 416 U.S. 363, 383 (1974) (Seventh Amendment to the United States Constitution); *Kentucky Comm'n on Human Rights* v. *Fraser*, 625 S.W.2d 852, 854 (Ky. 1981) (same); *Plasti-Line, Inc.* v. *Tennessee Human Rights Comm'n*, 746 S.W.2d 691, 693-694 (Tenn. 1988) (same under State Constitution); *Romero v. J & J Tire, JMH, Inc.*, 238 Mont. 146, 151 (1989) (no jury. trial right in discrimination case heard by administrative agency; Seventh Amendment and State Constitution).[9] It is, however, not within our authority to order such a

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[9] In expressing this opinion, we need not embrace the "public rights" doctrine that the United States Supreme Court has advanced to justify the denial of a Seventh Amendment right to a trial by jury in matters assigned for resolution to an administrative agency. See *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 51-53 (1989); *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 455 (1977). See 1 K.C. Davis & R.J. Pierce, Jr., Administrative Law § 2.8, at 100-101 (3d ed. 1994).

result in the face of a legislative mandate that a complainant must have the right to elect a judicial determination of her gender-based discrimination claim.

The order allowing the commission's motion to dismiss is vacated. The case is remanded to the Superior Court for further proceedings consistent with this opinion. A declaration shall be entered that James Lavelle will be entitled to a trial by jury on any of the complainant's claims that, after final agency action, has resulted in the granting of relief that departs from or exceeds the relief that a court of equity could traditionally have granted.

So ordered.

LYNCH, J. (concurring). I depart from the court's suggestion that, if G.L. c. 151B were amended to deprive both complainants and respondents of their jury trial rights, art. 15 would not be offended. I do not read the Commonwealth precedents as supportive of the court's position. The deprivation of art. 15 rights for both parties in those cases was predicated, at least in part, on the fact that the causes of action at issue were not analogous to those traditionally treated as actions at law. *Dalis* v. *Buyer Advertising, Inc.*, 418 Mass. 220, 226 (1994). Rather, they were equitable in nature and thus, exempt from art. 15 requirements.[10] See *Department of Revenue* v. *Jarvenpaa*, 404 Mass. 177, 188 (1989); *Opinion of the Justices*, 309 Mass. 571, 601-602 (1941); *Opinion of the Justices*, 309 Mass. 562, 568 (1941). While the Supreme Court of the United States has opined that "the Seventh

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[10] We have also concluded that the right to a jury trial under art. 15 was not affected by the workers' compensation statutes. It should also be noted that coverage under the workers' compensation system is voluntary. See *Opinion of the Justices*, 309 Mass. 571, 602 (1941); *Opinion of the Justices*, 309 Mass. 562, 569 (1941); *Young* v. *Duncan*, 218 Mass. 346, 349 (1914).

Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication," *Pernell* v. *Southall Realty*, 416 U.S. 363, 383 (1974), that view ought not control our interpretation of art. 15. Instead, we should scrupulously honor our Constitution's admonition that our traditional right to trial by jury is sacred.

Supreme Court, U.S.
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No. 04-315

IN THE

Supreme Court of the United States

WILFERT BROS. REALTY COMPANY, ET AL.,
Petitioners,

v.

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

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Questions Presented

The Petitioners have presented a single question, which reads as follows:

1. Does a state statute that permits employees claiming employment discrimination, but not employers accused of such discrimination, to remove the case to state court for a jury trial violate the Equal Protection Clause of the Fourteenth Amendment?

Respondents present the following additional questions for this Court's consideration:

2. May this Court consider the Petition for Writ of Certiorari even though the petition was filed twenty-eight days late?

3. Should this Court consider an argument based on the Fourteenth Amendment of the United States Constitution, where the Petitioners failed to raise any argument relating to the Fourteenth Amendment until they submitted a petition for rehearing *after* the highest state court issued its decision?

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Jurisdiction

Respondents do not concede that this Court has jurisdiction to consider the Joint Petition for a Writ of Certiorari ("Pet."). Here, jurisdiction should be denied because the federal question sought to be reviewed was never presented to the state trial court, the state court of appeals, or the state supreme court until Petitioners filed an untimely petition for rehearing following issuance of a decision by the Massachusetts Supreme Judicial Court. In addition, a petition for writ of certiorari to review an order in a civil case entered by a state court of last resort must be filed with the Clerk of the United States Supreme Court within 90 days after entry. Supreme Court Rules 13.1 and 13.3. This Petition for Writ of Certiorari was not filed until 118 days after the order in question was entered. Therefore, the Court should deny the Petitioners' untimely certiorari petition.[1]

Statement of the Case

For purposes of this Brief in Opposition to the Petition for Writ of Certiorari, the respondents -- David Keeling, Brenda Raffurty, Geraldine Ross, and the Massachusetts Commission Against Discrimination -- accept and incorporate by reference the facts set forth in the decision of the Massachusetts Supreme Judicial Court, as well as that court' discussion of the relevant statutory framework. *Stonehill College v. Massachusetts*

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[1] The decision below merely disposed of four interlocutory appeals and hence there is also an issue regarding the finality of the case for jurisdictional purposes. *See* 28 U.S.C. § 1257(a) (2000).

Commission Against Discrimination, 441 Mass. 549, 808 N.E.2d 205 (2004) (reproduced in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") at 1a to 57a).

Some aspects of the pertinent Massachusetts law merit emphasis:

The Massachusetts anti-discrimination statute, Mass. Gen. Laws ch. 151B, prohibits various forms of employment discrimination. Complainants (those alleging to be victims of employment discrimination) may elect to litigate their Chapter 151B claims in administrative proceedings conducted by the Massachusetts Commission Against Discrimination ("MCAD"). M.G.L. ch. 151B, § 5. If a complainant seeks to pursue remedies within the MCAD, neither the complainant nor the respondent is entitled to a jury trial. M.G.L. ch. 151B, § 5; *Stonehill College*, 441 Mass. at 566, 808 N.E.2d at 218-219; Pet. App. 21a-22a.

In the alternative, complainants may "remove" their cases from the MCAD and file civil actions in probate or superior court. M.G.L. ch. 151B, § 9. When a complainant files in probate court, neither the complainant nor the respondent is entitled to a jury trial. *Stonehill College*, 441 Mass. at 566 n.20, 808 N.E.2d at 219 n.20; Pet. App. 22a. If a complainant pursues her claim in superior court, however, both parties enjoy equal access to a jury trial. *Stonehill College*, 441 Mass. at 566, 808 N.E.2d at 218-219; Pet. App. 22a.

The important point to keep in mind is that within each forum (the MCAD, probate court or superior court), complainants and respondents have equal rights to claim a jury trial. *Id.*

Petitioners take issue with the fact that complainants are entitled to select the forum, and thereby are placed in the position of inviting or barring a jury trial. As will be shown below, the law in general often affords complainants the opportunity to choose among various forums, and such opportunities do not implicate Equal Protection Clause concerns, even if the choice has an impact on whether a jury trial will take place.

Reasons for Denying the Petition

I. PETITIONERS FAILED TO FILE A TIMELY PETITION *(An Untimely Motion For Rehearing Does Not Toll The 90-Day Jurisdictional Requirement Of Rule 13.1)*

A petition for writ of certiorari to review an order in a civil case entered by a state court of last resort must be filed with the Clerk of the United States Supreme Court within 90 days after entry of judgment. Rules 13.1 and 13.3. The time for filing of appeals is extended when a party has filed a timely petition for rehearing. Rule 13.3. More specifically, the second sentence of that rule reads, in relevant part, as follows:

> [I]f a petition for rehearing is **timely** filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment.

Supreme Court Rule 13.3 (emphasis supplied). "The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal." *Bowman v. Loperena*, 311 U.S. 262, 266 (1940); *see also Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144, 150 (1942). "Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew." *Federal Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952).

Under Massachusetts law, a petition for rehearing is timely if "filed with the clerk of the appellate court within fourteen days after the date of the rescript unless the time is shortened or enlarged by order." Mass. R. App. P. 27(a). The Supreme Judicial Court docketed the rescript of the *Stonehill College* decision on May 6, 2004. Respondents' Supplemental Appendix ("S.A.") at 7 (Paper no. 31). The Joint Petition for Rehearing and a Motion to File Petition for Rehearing Late were not filed until twenty-two days later, making such a petition for rehearing untimely. S.A. 8 (Papers nos. 36 & 37). The court neither acted on the Petitioners' Joint Motion to File Petition for Rehearing Late, nor enlarged the time to file by order. *Id.* It summarily denied the petition for rehearing without giving any indication of having ruled on its merits. *Id.* (Paper no. 38).

Since the request for rehearing was untimely, it does not restart the clock for filing the petition for writ of certiorari. *See Pfister*, 317 U.S. at 150 ("an untimely petition for rehearing . . .

which is not entertained or considered on its merits" does not extend the time to appeal from the original order). As the rescript containing the final order[2] that Petitioners seek to have reviewed here issued on May 6, 2004, the deadline for filing a petition for writ of certiorari was August 4, 2004. The Petitioners did not file their request for certiorari review with the Clerk until September 1, 2004, well beyond the deadline set by Rule 13.1. Thus, the Petitioners have lost their opportunity for Supreme Court review, and their certiorari petition must be denied.

II. THE RECORD IS INSUFFICIENTLY DEVELOPED TO MERIT SUPREME COURT REVIEW.

The Petition for Writ of Certiorari should also be denied because Petitioners admit that the federal question they are presenting here was not raised until Petitioners' late-filed petition for rehearing. Pet. 19. *See Mishkin v. New York*, 383 U.S. 502, 512-513 (1966); *Walters v. City of St. Louis*, 347 U.S. 231, 233 (1954). Generally, a constitutional question is urged too late if put forward for the first time upon a petition for rehearing. *See American Surety Co. v. Baldwin*, 287 U.S. 156, 162-164 (1932) (federal claim based on Fourteenth Amendment first raised in rehearing could not serve as basis for review by Court). Petitioners bear the burden of demonstrating that they presented the federal constitutional claim "with fair precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 85-86

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[2] The final sentence of the *Stonehill College* decision states, however, that "the four cases [consolidated for decision] are to stand for further proceedings in the Superior Court." Pet. App. 35a.

n.9 (1980). Importantly, the Massachusetts Rules of Court did not afford the Respondents any opportunity at the rehearing stage to respond to Petitioners' Fourteenth Amendment argument. *See* Mass. R. App. P. 27(a) ("No answer to a petition for rehearing will be received unless requested by the quorum or panel.").

Indeed, the instant pleading represents the first time in which any Respondent has addressed the Petitioners' Fourteenth Amendment argument. Therefore, the record is woefully underdeveloped, and as such this case does not afford an appropriate opportunity for the Supreme Court to address the question presented.

Petitioners attempt to excuse the untimely assertion of their purported Fourteenth Amendment equal protection claim by arguing that the Massachusetts Supreme Judicial Court took an unexpected step in *Stonehill College* in overturning a key precedent: *Lavelle v. Mass. Comm'n Against Discrim.*, 426 Mass. 332, 426 N.E.2d 1331 (1997). *See* Pet. 19 (citing *Pruneyard Shopping Ctr.*, 447 U.S. at 85-86 n.9 (1980)). However, in 2003 the Supreme Judicial Court clearly signaled its intention to review the soundness of its precedents in this area. S.A. 5 (Paper no. 6.5). In its *Stonehill College* decision, the court stated:

> We . . . invited interested parties to submit briefs concerning . . . the correctness of this court's holding in *Dalis v. Buyer Advertising, Inc.*, 418 Mass. 220, 223 (1994) . . . . Necessarily contained in that request was a corollary issue calling for the parties and interested parties also to

> express views on the subsequent extension of the *Dalis* holding, in *Lavelle*, *supra*, to respondents in administrative proceedings before the MCAD pursuant to G.L. c. 151B, § 5[.]

Stonehill College, 418 Mass. at 551, Pet. App. at 4a. No employer-petitioner made any argument based on the Federal Constitution until after their loss in the Supreme Judicial Court, even though many briefs were filed either supporting or inviting the reversal of *Lavelle*. At least some of the petitioners clearly contemplated that *Lavelle* was in jeopardy and made arguments against *Lavelle*'s reversal.[3] Contrary to Petitioners' arguments that they were surprised by the reversal of *Lavelle*, the *Stonehill College* court expressly stated that it was *not* announcing a new principle whose resolution was not clearly foreshadowed. *See Stonehill College*, 441 Mass. at 569-570, Pet. App. at 26a. Taking into account (1) the Petitioners' arguments against the reversal of *Lavelle*, (2) the invitation by the court to submit briefs on the underpinnings of *Lavelle*, and (3) the court's acknowledgement that the ultimate result was foreshadowed, there can be no justification for the failure to raise any federal

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[3] *See* S.A. 10 (Keyland Corporation's Supplemental Brief on Issue of Whether *Dalis v. Buyer Advertising, Inc.* Was Correctly Decided, p. 10) ("[I]f *Dalis* is overruled, the [Court] should not overrule *Lavelle*"). *See also* S.A. 12 (Brief for New England Legal Foundation, Associated Industries of Massachusetts, and Boston Area Management Attorneys Group as *Amici Curiae*, p. 5) ("This Court has invited amici to address the question of whether *Dalis* was correctly decided. Amici here respectfully suggest that the issues before the Court are better addressed by a reexamination of the holding in *Lavelle*.").

constitutional question until after an unsuccessful appeal to the State's highest court.

III. THE COURT SHOULD DENY THE PETITION BECAUSE THERE IS NO SPLIT BETWEEN TWO OR MORE HIGHEST STATE COURTS CONCERNING THE IMPACT, IF ANY, OF THE FOURTEENTH AMENDMENT ON ACCESS TO JURY TRIALS.

The Petitioners urge the Court to accept this case because allegedly "there is an ever-deepening divide between the highest courts of various states concerning" the question whether the Equal Protection Clause of the Fourteenth Amendment mandates that equal forum selection rights (and jury trial access) be afforded those charged with discrimination and the victims of such discrimination. Pet. 11. The Court should deny the certiorari petition because the *Stonehill College* decision does not create an active split among state courts. Rather, the cases identified by Petitioners illustrate nothing more than varying applications of different state constitutions. All of the cases involving this issue turn on the interpretation of *state* constitutions, and not any interpretation of the federal Constitution.

The Petitioners assert that a divide has formed between Hawaii and Rhode Island, on the one hand, and Missouri and Tennessee, on the other. However, the Petitioners themselves acknowledge that neither Missouri nor Tennessee relied on federal grounds. Pet. at 13 ("Missouri Supreme Court did not expressly rest its decision on any federal equal protection argument") ("Tennessee courts' decisions do not consider a

federal equal protection challenge either."). The Petitioners, in an effort to manufacture a false dichotomy, assert that Hawaii's highest court adopted a Fourteenth Amendment analysis when making its ruling. Pet. at 12; *see SCI Management Corp. v. Sims*, 71 P.3d 389, 401-403 (Haw. 2003). Such a position flies in the face of the express language of the *SCI Management* court, which stated that it was *not* deciding the case on the basis of the Fourteenth Amendment to the United States Constitution. *See SCI Management*, 71 P.3d at 395 n.8 (failure to raise Fourteenth Amendment challenge resulted in waiver). Finally, the Petitioners argue that *FUD's Inc. v. Rhode Island*, 727 A.2d 692, 697-98 (R.I. 1999), was decided on Fourteenth Amendment grounds. Not only was this decision devoid of any reference to the Fourteenth Amendment or federal claims, the Rhode Island Supreme Court expressly decided the case on Article 1, section 15, of the Rhode Island State Constitution. *See id.* at 695.[4]

According to Rule 10, "[r]eview on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." One such reason is when a state court of last resort has decided an important federal question in a way that conflicts with the

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[4] Furthermore, the Rhode Island Legislature effectively mooted the state law problem originally presented in *FUD's Inc.* by enacting R.I. Stat. § 28-5-24.1(c) (1999) (permitting respondents to elect--within 20 days of a probable cause finding--to end agency proceedings and have the case heard in court). In doing so, the state availed itself of the opportunity to correct any perceived *state law* constitutional defect. There is thus no divide among the states on any federal constitutional issue.

decision of another state court of last resort. *See* Rule 10(b). However, the purported conflict the Petitioners posit does not implicate the federal Constitution. Rather, all cases cited by Petitioners are based solely upon state law. Thus, the Court should decline to exercise its judicial discretion to grant the certiorari petition as there is no compelling federal reason for it to act.

IV. THERE IS NO FEDERAL CONSTITUTIONAL RIGHT TO A JURY TRIAL WHERE A DISCRIMINATION CLAIM ASSERTED UNDER A STATE STATUTE IS TRIED IN A STATE COURT OR ADMINISTRATIVE FORUM.

Even if this certiorari petition is not jurisdictionally barred, the Court should not entertain its discretion to grant the petition because the Petitioners' arguments lack merit. Petitioners contend that their right to a jury trial in state court or state administrative proceedings is a "fundamental right." Pet. at 15, 17 nn. 5, 18. Labeling their desire for a jury trial as a "fundamental right," Petitioners seek to lend gravitas to their theory that they have been unjustifiably denied equal protection of the laws. However, for purposes of federal equal protection review, there is no "fundamental right" at issue here.

The right to trial by jury in civil cases guaranteed by the Seventh Amendment of the Constitution of the United States has not been made applicable to the States through the Fourteenth Amendment. *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974). States are free to regulate trials in their own courts in their own way, and they may reject the option of jury determination.

Walker v. Sauvinet, 92 U.S. 90, 92-93 (1875). Indeed, Petitioners do not, and cannot, argue that they are entitled to a jury trial under the Seventh Amendment.[5]

Given that States are empowered to accord or withhold jury trials for actions in state courts or proceedings at their whim, the fact that a state law has blocked an employer from a guaranteed jury trial in state court is of no special concern from the point of view of the Federal Constitution.[6] Therefore, there is no federal "fundamental right" to a jury trial under these circumstances. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-313 & n.3 (1976) (listing examples of fundamental rights which spring from substantive protections arising directly from the Federal Constitution). As no

[5] While it is true that the Seventh Amendment will afford parties the right to a jury trial if a M.G.L. ch. 151B claim is tried in federal court, *Gallagher v. Wilton Enterprises, Inc.*, 962 F.2d 120, 123-24 (1st Cir. 1992); Pet. 15, none of the complainants brought federal court proceedings in this case. Thus, the Seventh Amendment is completely inapplicable.

[6] If the Petitioners were raising a Massachusetts equal protection claim, the right to a jury trial would be considered a "fundamental right." That is because the right to a jury (*if* the parties find themselves in superior court) is guaranteed by the Massachusetts Constitution. *See Lavelle*, 426 Mass. at 333, 688 N.E.2d at 1332-1333, *overturned in part by Stonehill College*, 441 Mass. at 561-562, 808 N.E.2d at 215-216 (describing the right to a jury as a fundamental right, and citing to Article 15 of the Massachusetts Declaration of Rights). However, there is no such right guaranteed by the United States Constitution, which is the sole ground underlying the Petitioners' certiorari petition.

"fundamental right" is at issue, complainants may be treated differently from respondents based on "rational basis" scrutiny. *Murgia*, 427 U.S. at 313-314.[7]

In finding that there were no equal protection issues with the M.G.L. ch. 151B procedural scheme, the Massachusetts Supreme Judicial Court quoted the case of *Panama Railroad Co. v. Johnson*, 264 U.S. 375 (1924):

> There are many instances in the law where a person entitled to sue may choose between alternative measures of redress and modes of enforcement; and this has been true since before the Constitution. But it never has been held, nor thought so far as we are advised, that to permit such a choice between alternatives otherwise admissible is a violation of due process of law. In the nature of things, the right to choose cannot be accorded to both parties, and, if accorded to either, should rest with the one seeking redress rather than the one from whom redress is sought.

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[7] Here, the Massachusetts Legislature has drawn distinctions between employees and employers, and has afforded employees the choice of forum. Such distinctions are subject only to rational basis scrutiny. *See Hodel v. Indiana*, 452 U.S. 314, 331 (1981) ("Social and economic legislation . . . that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate government purpose"); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 212-213 (1995).

Id. at 392-393.

Petitioners seek to distinguish the *Panama R.R.* case on the grounds that it does not involve a "fundamental right." Pet. at 17 n.5. However, as shown above, for the purpose of Equal Protection Clause analysis, there is no federal fundamental right involved in *this* case either. Therefore, to permit complainants to select the forum does not violate the federal Constitution.

V. THE MASSACHUSETTS STATUTORY SCHEME DOES NOT DENY EMPLOYERS JURY TRIALS FOR CLAIMS ARISING UNDER FEDERAL ANTI-DISCRIMINATION STATUTES.

The Petitioners incorrectly imply that employers are being denied jury trials to which they are entitled under federal anti-discrimination statutes. Pet. at 15. It is true that various federal statutes (such as Title VII and the ADA) accord the parties the right to a jury trial once a civil action is initiated under one of those statutes. Pet. at 15 n.3. However, in the cases below, no complainant sought to recover under a federal statute, and no civil action was ever initiated by a complainant.

A victim of discrimination must initiate her claim by filing an administrative charge, either in the MCAD or Equal Employment Opportunity Commission. These agencies have a work-sharing agreement, whereby a complaint filed with one agency will also be deemed filed with the other. Thus, a charge filed with the MCAD may well include allegations of violations of federal statutes such as Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act.

However, if the complainant seeks to pursue her claims in the MCAD, she must forego her federal claims. The MCAD does not rule on issues of federal law. *See New Bedford v. MCAD*, 440 Mass. 450, 462 n.24, 799 N.E.2d 578 (2003). The MCAD is not empowered to hold a public hearing to determine whether there has been a violation of federal law. *McGowan v. Stoneham Police Dept.*, 4 MDLR 1109, 1120 & n.3 (1982), 1982 Mass. Comm. Discrim. Lexis 53, at 13 & n.3. Petitioners fail to identify a single example of any final decision of the MCAD that turns on federal law.

Therefore, Petitioners mount a straw argument when they claim that employers can stand accused of violations of federal statutes and yet be "trapped" in the MCAD without a jury trial. Pet. at 15. To the extent that a claim proceeds to a public hearing at the MCAD, the only issue involved is whether M.G.L. ch. 151B was violated.[8] The MCAD simply has no jurisdiction to enforce Title VII or other federal statutes, and therefore, Petitioners are not being denied any rights under federal law.

---

[8] There is nothing new in permitting the complainant to pursue or delete claims in such a manner as to compel a certain forum. For example, a plaintiff may defeat federal subject matter jurisdiction by omitting parallel federal claims, despite the fact that such claims are available. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). On the other hand, defendants may remove actions from state courts, even when the change of forum may affect procedural rights such as the right to a jury. 28 U.S.C. §§ 1441(a) & 1446(a); *see Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 533-540 (1958).

Conclusion

For all of the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: October 8, 2004

Counsel for Respondents

Respondents' Supplemental Appendix
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Appendix B: **Excerpt from Keyland Corporation's Supplemental Brief on Issue of Whether *Dalis v. Buyer Advertising, Inc.* Was Correctly Decided** ..... **S.A. 9-10**

Appendix C: **Excerpt from Brief for New England Legal Foundation, Associated Industries of Massachusetts, and Boston Area Mgmnt. Attorneys Group as *Amici Curiae*** . **S.A. 11-12**

Appendix A

SUPREME JUDICIAL COURT
for the Commonwealth
Case Docket

STONEHILL COLLEGE vs. MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION & another

SJC-09112

CASE HEADER

Case Status	Pet'n rehearing denied	**Status Date**	06/03/2004
Nature	Discrimination law	**Entry Date**	09/30/2003
Appellant	Plaintiff	**Case Type**	Civil
Brief Status		**Brief Due**	
Quorum	Marshall, C.J., Greaney, Ireland, Spina, Cowin, Sosman, Cordy, JJ.		

APPENDIX A

S.A. 1

Argued Date	02/03/2004	**Decision Date**	05/06/2004
AC/SJ Number	2003-P-0870	**Citation**	441 Mass. 549
DAR/FAR Number	DAR-13558	**Lower Ct Number**	BRCV2002-01427
Lower Court	Bristol Superior Court	**Lower Ct Judge**	David A. McLaughlin, J.
Route to SJC	Direct Appellate Review		

INVOLVED PARTY	ATTORNEY APPEARANCE
Stonehill College	M. Robert Dushman, Esquire
Plaintiff/Appellant	Amanda Buck Varella, Esquire
Blue br & appendix transf w/case	
18 Main Br., 15 App., 18 Reply Br.	
MA Comm. Against Discrimination	Beverly I. Ward, Esquire
Defendant/Appellee	Steven Locke, Esquire
Red brief transferred w case	Robert L. Quinan, Jr., A.A.G.
19 Main Br.	
Soo Tang Tan	Nancy S. Shilepsky, Esquire
Defendant/Appellee	Lawrence J. Casey, Esquire
Red brief transferred w case	Patricia A. Washienko, Esquire
18 Main Br.	Michael A. Bean, Esquire
Nat'l Employment Lawyers Assoc.	James S. Weliky, Esquire
Amicus	Laura M. Unflat, Esquire

New England Legal Foundation Amicus Amicus brief filed 7 Main Br.	Christine Hughes, Esquire
Associated Industries of MA Amicus On brief of another party	Christine Hughes, Esquire
Boston Area Management Attorneys Amicus On brief of another party	Arthur G. Telegen, Esquire Anjali Parekh Prakash, Esquire Richard L. Alfred, Esquire Sally Adams, Esquire James M. Paulson, Esquire Joel P. Suttenberg, Esquire
Jewish Alliance for Law & Social Amicus Amicus brief filed 1 Main Br.	
MA Employment Lawyers Assoc. Amicus Amicus brief filed 18 Main Br.	James S. Weliky, Esquire Laura M. Unflat, Esquire
American Civil Liberties Union Amicus Amicus brief filed 18 Main Br.	Sarah R. Wunsch, Esquire Anne L. Josephson, Esquire Ellen J. Zucker, Esquire James S. Weliky, Esquire Nadine Cohen, Esquire
Women's Bar Association of MA Amicus	Sarah R. Wunsch, Esquire Anne L. Josephson, Esquire

On brief of another party	Ellen J. Zucker, Esquire James S. Weliky, Esquire Nadine Cohen, Esquire Sarah R. Wunsch, Esquire Anne L. Josephson, Esquire
Lawyers' Comm. for Civil Rights Amicus On brief of another party	Ellen J. Zucker, Esquire James S. Weliky, Esquire Nadine Cohen, Esquire Sarah R. Wunsch, Esquire Anne L. Josephson, Esquire
Gay & Lesbian Advocates & Defs. Amicus On brief of another party	Ellen J. Zucker, Esquire James S. Weliky, Esquire Nadine Cohen, Esquire Sarah R. Wunsch, Esquire Anne L. Josephson, Esquire
MA Lesbian and Gay Bar Assoc. Amicus On brief of another party	Ellen J. Zucker, Esquire James S. Weliky, Esquire Nadine Cohen, Esquire

DOCKET ENTRIES

Entry Date	Paper	Entry Text
09/30/2003	#1	Entered. Notice to counsel.

09/30/2003		Transferred from Appeals Court: Plaintiff/Appellant's Brief and Record Appendix (7) copies of each. Defendant/Appellee's (MCAD) Brief (7) copies. Defendant/Appellee's (Soo Tang Tan) Brief (7) copies.
10/02/2003	#2	Additional 11 copies of each Appellant's Brief & Appendix filed by Stonehill College.
10/02/2003	#3	SERVICE of appellant's reply brief for Stonehill College by M. Robert Dushman, Esquire.
10/03/2003	#4	Additional 11 copies of Brief filed by Soo Tang Tan.
10/07/2003	#5	Additional 12 copies of Brief filed by Massachusetts Commission Ag'st Discrimination.
10/16/2003	#6	ORDER (By the Court): This case will be argued at the court's February, 2004 sitting. The parties may, if they wish, file supplemental briefs or memoranda on or before January 15, 2004, on the question whether Dalis v. Buyer Advertising, Inc., 418 Mass. 220 (1994), was correctly decided. See attached copy of amicus announcement. (Notice to counsel.)
10/16/2003	#6.5	ANNOUNCEMENT: These cases (SJC-9002, -9081, -9100 and -9112) involve a variety of issues regarding the assertion of jury trial rights by parties that were respondents in proceedings before the MCAD. See Lavelle v. MCAD, 426 Mass. 332 (1997). Amici are invited to address the various issues raised by the parties as well as the additional question, not raised by the parties, whether Dalis v. Buyer Advertising Inc., 418 Mass. 220 (1994) was correctly decided. Arguments are scheduled for Feb. 2004. (Distributed to list on file.)
12/16/2003	#7	NOTICE of February argument sent.
01/08/2004	#8	ORDERED for argument on February 3. Notice sent.
01/12/2004	#9	MOTION to extend to January 20 filing of Supp. Br. for MA Comm. Against Discrimination by Beverly I. Ward, Esquire, Steven Locke, Esquire. Allowed. Notice.
01/15/2004	#10	SERVICE of supplemental brief filed for Stonehill College by M. Robert Dushman, Esquire, Amanda Buck Varella, Esquire.
01/15/2004	#11	MOTION to extend to January 23, 2004, filing of Amicus Brief, filed for Nat'l

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SJC-09100

KEYLAND CORPORATION and JOHN KHEARY
Plaintiffs-Appellees

v.

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION
and BRENDA RAFFURTY

Defendants-Appellants

ON DIRECT APPELLATE REVIEW FROM A REPORT TO THE APPEALS COURT FROM A JUSTICE IN DUKES COUNTY SUPERIOR COURT

PLAINTIFFS-APPELLEES' SUPPLEMENTAL BRIEF ON ISSUE OF WHETHER *DALIS v. BUYER ADVERTISING, INC.* WAS CORRECTLY DECIDED

The Plaintiffs-Appelles
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On Brief:
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difference whether the employee had the right to a jury trial or not. That is what Lavelle holds, in Keyland's view. In Keyland's view, Lavelle is not just an "equal protection" case. Lavelle is an important declaration that Massachusetts is a democracy, not a little room in which a single governmental employee (an MCAD commissioner, MCAD hearing officer, or Superior Court judge) can take away a large sum of a business's or individual's money (property).

Thus, if Dalis is overruled, the SJC should not overrule Lavelle. The SJC should hold that even though the plaintiff does not have the right to a jury trial in an employment discrimination case (except in an age discrimination case, where the Legislature has explicitly given the plaintiff the right to a jury trial), the employer has the right to a jury trial in Superior Court if the MCAD has ordered the employer to pay emotional distress damages to the employee.

If Dalis is overruled and Lavelle is overruled with it, Keyland urges the SJC to also overrule Bournewood Hosp. v. MCAD, 371 Mass. 303, 316 (1976); College-Town Div. of Interco, Inc. v. MCAD, 400 Mass. 156, 161 (1987); and Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 674-75 (2000), to the extent that those cases hold that the MCAD can award emotional

APPENDIX C

NO. SJC-9100

KEYLAND CORPORATION and JOHN KHEARY,
Plaintiffs-Appellees,

v.

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION
and BRENDA RAFFURTY,
Defendants-Appellants.

On Direct Appellate Review From A Report To The Appeals Court From A Justice Of The Dukes Superior Court

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NO. SJC-9112

STONEHILL COLLEGE,
Plaintiff-Appellant,

v.

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION
and SOO TANG TAN,
Defendants-Appellees.

On Appeal From An Order Of The Bristol Superior Court

BRIEF FOR NEW ENGLAND LEGAL FOUNDATION, ASSOCIATED INDUSTRIES OF MASSACHUSETTS and BOSTON AREA MANAGEMENT ATTORNEYS GROUP AS *AMICI CURIAE*

NEW ENGLAND LEGAL FOUNDATION
and ASSOCIATED INDUSTRIES OF
MASSACHUSETTS

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ARGUMENT

This Court erred in holding in Lavelle that a respondent in a G. L. c. 151B proceeding may not obtain a jury trial until the Massachusetts Commission Against Discrimination has taken final action.

This Court has invited amici to address the question of whether Dalis was correctly decided. Amici here respectfully suggest that the issues before the Court are better addressed by a reexamination of the holding in Lavelle that respondents may obtain their jury trial only upon final action of the MCAD. The pending cases demonstrate that Lavelle's attempt to harmonize the intent of the legislature with the demands of the Constitution has failed, both as constitutional law and as public policy.

I. DISSIMILAR JURY TRIAL RIGHTS BETWEEN COMPLAINANTS AND RESPONDENTS VIOLATE EQUAL PROTECTION.

Granting respondents a jury trial right, but delaying it for years, while granting it immediately as of right to complainants, has proved inconsistent with this Court's own articulation in Lavelle of the demands of equal protection:

> If one side to a dispute has a constitutional right to a jury trial, generally the other side must have a similar right. We are dealing here with a fundamental right (art. 15 says the right is sacred), and differing

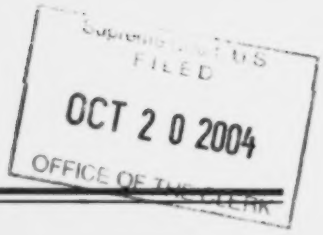
		Employment Lawyers Assoc. by James S. Weliky, Esquire, Laura M. Unflat, Esquire.
01/15/2004	#12	SERVICE of supplemental brief & appendix filed for Soo Tang Tan by Lawrence J. Casey, Esquire, Nancy S. Shilepsky, Esquire, Patricia A. Washienko, Esquire, Michael A. Bean, Esquire.
01/20/2004	#13	MOTION TO FILE AMICUS BRIEF, filed for New England Legal Foundation & others by Christine Hughes, Esquire and others.
01/20/2004	#14	SERVICE of amicus brief for Amicus New England Legal Foundation & others by Christine Hughes, Esquire. *(18) copies filed addressing additional cases: SJC-9002, SJC-9081, SJC-9100.
01/22/2004	#15	MOTION to File Non-Conforming Brief One-Day Late, filed for MA Comm. Against Discrimination by Robert L. Quinan, Jr., A.A.G.. *Late filing accepted. Referred to the Justices in all other respects.
01/22/2004	#16	SERVICE of supplemental brief filed for MA Comm. Against Discrimination by Robert L. Quinan, Jr., A.A.G.. *10 copies.
01/22/2004	#17	SERVICE of amicus brief for Amicus Jewish Alliance for Law & Social by Joel P. Suttenberg, Esquire. *18 Joint copies filed for SJC-9002, SJC-9081, SJC-9100, SJC-9112.
01/23/2004	#18	SERVICE of amicus brief for Amicus MA Employment Lawyers Assoc. by James S. Weliky, Esquire, Laura M. Unflat, Esquire.
01/23/2004	#19	MOTION to File Supplemental Brief, filed for Soo Tang Tan by Lawrence J. Casey, Esquire, Nancy S. Shilepsky, Esquire, Patricia A. Washienko, Esquire, Michael A. Bean, Esquire. *Referred to the Justices.
01/23/2004	#20	SERVICE of supplemental brief filed for Soo Tang Tan by Lawrence J. Casey, Esquire, Nancy S. Shilepsky, Esquire, Patricia A. Washienko, Esquire, Michael A. Bean, Esquire.
01/23/2004	#21	MOTION TO FILE AMICUS BRIEF, filed for American Civil Liberties Union by Sarah R. Wunsch, Esquire, Anne L. Josephson, Esquire, Ellen J. Zucker, Esquire, James S. Weliky, Esquire, Nadine Cohen, Esquire.

01/23/2004	#22	SERVICE of amicus brief for Amicus American Civil Liberties Union by Sarah R. Wunsch, Esquire, Anne L. Josephson, Esquire, Ellen J. Zucker, Esquire, James S. Weliky, Esquire, Nadine Cohen, Esquire.
01/27/2004	#23	OPPOSITION to Paper #19 (MOTION TO FILE SUPPLEMENTAL REPLY BRIEF), filed by Stonehill College. *Referred to the Justices. Notice sent.
01/29/2004	#24	MOTION to adjust the allocation of oral argument time, filed for MA Comm. Against Discrimination by Robert L. Quinan, Jr., A.A.G.. *Allowed to allocation of requested time for argument.
02/02/2004	#25	MOTION to participate in oral argument, filed for American Civil Liberties Union & othes by Sarah R. Wunsch, Esquire, Anne L. Josephson, Esquire, Ellen J. Zucker, Esquire, James S. Weliky, Esquire, Nadine Cohen, Esquire.
02/03/2004		Oral argument held. (CJM G I S C SN CY).
02/23/2004	#26	Post-Argument letter from Atty. Shilepsky, counsel for Soo Tang Tan. *Distributed to Justices.
02/23/2004	#27	POST-ARGUMENT LETTER from Anne L. Josephson, Esquire for ACLU, Women's Bar Assoc. and others. *Distributed to Justices.
02/26/2004	#28	SERVICE of supplemental amicus brief filed for New England Legal Foundation, Assoc. Industries of Mass. and Boston Area Management Atty. Group by Christine Hughes, Esquire.
02/26/2004	#29	MOTION to File Supplemental Brief, filed for MA Comm. Against Discrimination by Beverly I. Ward, Esquire.
02/26/2004	#30	SERVICE of supplemental brief filed for MA Comm. Against Discrimination by Beverly I. Ward, Esquire, Steven Locke, Esquire, Robert L. Quinan, Jr., A.A.G..
05/06/2004	#31	RESCRIPT (Full Opinion): Stonehill College's request in the Superior Court for a jury trial is struck. The case is to be deemed as a case filed in the Superior Court for review and decision under G. L. c. 30A, on the records prepared before the Massachusetts Commission Against Discrimination in the G. L. c. 151B, s. 5, proceedings. On this basis,

		the case is to stand for further proceedings in the Superior Court.
05/12/2004	#32	Letter from M. Robert Dushman, esquire:...there is a factual error in footnote 23...
05/14/2004	#33	E-mail from Reporter detailing change in opinion.
05/17/2004	#34	LETTER from M. Robert Dushman:... the same factual error occurs in footnote which cross-references footnote 23.
05/19/2004	#35	MOTION for Clarification, filed for Soo Tang Tan by Nancy S. Shilepsky, Esquire, Lawrence J. Casey, Esquire, Patricia A. Washienko, Esquire, Michael A. Bean, Esquire.
05/28/2004	#36	JOINT MOTION to file petition for rehearing late, filed for Stonehill College by M. Robert Dushman, Esquire, Amanda Buck Varella, Esquire.
05/28/2004	#37	(Collective) PETITION FOR REHEARING, filed for Stonehill College by M. Robert Dushman, Esquire, Amanda Buck Varella, Esquire.
06/03/2004	#38	DENIAL of petition for rehearing. (By the Court) Notice to counsel.
06/04/2004		RESCRIPT ISSUED to trial court.
07/01/2004	#39	ORDER (By the Court): After consideration of the various motions and requests of the parties concerning the issue of appellate attorney's fees and costs, the court concludes, and orders, that each of the moving and requesting parties pay their own attorney's fees and costs in connection with the appeals and, therefore, that no attorney's fees and costs in connection with the appeals be assessed either here, or in the trial court, against any respondent should any complaint prevail.
07/15/2004	#40	Motion for reconsideration of the denial of attorney's fees and costs, filed for Soo Tang Tan by Nancy S. Shilepsky, Esquire, Lawrence J. Casey, Esquire, Patricia A. Washienko, Esquire, Michael A. Bean, Esquire. (Denied) By the Court. Notice sent.

(2)

No. 04-315



IN THE

Supreme Court of the United States

WILFERT BROTHERS REALTY COMPANY, ET AL.,

Petitioners,

v.

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

JOINT REPLY TO OPPOSITION OF RESPONDENTS

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Counsel for Petitioners

Date: October 20, 2004

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Petitioners reply to one new question raised by Respondents not discussed in the Joint Petition For Writ Of Certiorari:

2. May this Court consider the Petition for Writ of Certiorari even though the petition was filed twenty-eight days late?

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Massachusetts Rules of Appellate Procedure

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. THE PETITION FOR WRIT OF CERTIORARI WAS TIMELY FILED

A. The Massachusetts Supreme Judicial Court Enlarged The Time For Filing A Petition For Rehearing

Respondents erroneously argue that the Massachusetts Supreme Judicial Court neither acted on Petitioners' Joint Motion To File Petition For Rehearing Late, nor enlarged the time to file by order, thus making the Petition for Writ of Certiorari untimely. In fact, the Supreme Judicial Court did both as evidenced in its recently clarified docket. See docket entry # 54, A. 13a.

Supreme Court Rule 13.3 reads, in relevant part:

> where a petition for rehearing is timely filed in the lower court, the time to file the petition for a writ of certiorari . . . runs from the date of the denial of the petition for rehearing.

The Supreme Judicial Court issued its full opinion, also known as the rescript opinion, in this case on May 6, 2004. See docket entry # 51, A. 12-13a. Under Rule 27 (a) of the Massachusetts Rules of Appellate Procedure, a petition for rehearing should be filed "within fourteen days after the date of the rescript *unless the time is shortened or enlarged by order.*" Mass. R. App. P. 27 (a) (emphasis supplied).

Consistent with the Supreme Judicial Court's practice, Petitioners filed their Joint Motion to File

Petition for Rehearing Late together with their Petition for Rehearing on May 28, 2004, twenty-two days after the date of the rescript opinion. A. 13a. The Supreme Judicial Court allowed the motion. See docket entry # 54.[1] A. 13a. There is no doubt that the Supreme Judicial Court enlarged the time for filing the Petitioners' Petition for Rehearing making it a timely filing under Mass. R. App. P. 27 (a). Consequently, the Petition for Certiorari filed with this Court fell squarely within the dictates of Supreme Court Rule 13.3.

B. The Massachusetts Supreme Judicial Court Considered The Petitioners' Timely Filed Joint Petition For Rehearing On Its Merits

Respondents also incorrectly argue that the Supreme Judicial Court did not consider the Joint Petition For Rehearing on its merits. The Order received by all the parties of record clearly indicates that the lower court not only considered the petition as timely, but also considered the petition on its merits.

On June 3, 2004, the Supreme Judicial Court entered its Notice Of Denial Of Petition For Rehearing, stating that "[t]he Petition for Rehearing filed in the above captioned case has been considered by the court and is denied." A. 15a. The Order unequivocally states that the petition was considered, and the absence of further discussion does not establish that it was not considered on its merits, as asserted by Respondents.

---

[1] Petitioners filed a motion to clarify the Supreme Judicial Court's docket on October 14, 2004, which was allowed, because the docket, at that time, did not explicitly state that Petitioners' motion had been allowed. See docket entry # 60, A. 14a.

Respondents cite to *Bowman v. Loperena*, 311 U.S. 262 (1940), for the rule determining when time begins to run for purposes of Rule 13.3, however, their citation is incomplete. Respondents fail to note that unlike the case at hand, the *Bowman* Court dealt with an untimely petition for rehearing. Moreover, relying upon an exception to the rule, *Bowman* held that the appeal in that case was timely. Specifically, *Bowman* held:

> [t]he filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal. *But where the court allows the filing, and after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof.*

Bowman, 311 U.S. at 266 (citations omitted)(emphasis added). Thus, even if Petitioners' Petition for Rehearing was considered untimely, the *Bowman* rule applies in this case where the Supreme Judicial Court allowed the filing and considered the petition on its merits.

CONCLUSION

The Supreme Judicial Court's docket clearly shows that the time for filing Petitioners' Petition for Rehearing was enlarged by order and was considered on its merits, refuting Respondents' jurisdictional argument.

Respectfully submitted,

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Date: October 20, 2004

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APPENDIX A

Supreme Judicial Court for the Commonwealth — Case Docket 1a

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APPENDIX A

SUPREME JUDICIAL COURT
for the Commonwealth
Case Docket

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY vs.
GERALDINE ROSS & another
SJC-09002

CASE HEADER

Case Status	Decided, cert. pending
Nature	Discrimination law
Appellant	Plaintiff
Brief Status	
Quorum	Marshall, C.J., Greaney, Ireland, Spina, Cowin, Sosman, Cordy, JJ.
Argued Date	02/03/2004
AC/SJ Number	2003-P-0377
DAR/FAR Number	DAR-13364
Lower Court	Suffolk Superior Court
Route to SJC	Direct Appellate Review
Status Date	09/13/2004
Entry Date	04/29/2003
Case Type	Civil
Brief Due	
Decision Date	05/06/2004
Citation	441 Mass. 549
Lower Ct Number	SUCV2002-00880
Lower Ct Judge	Peter W. Agnes, Jr., J.

ADDITIONAL INFORMATION

Full party name:	Massachusetts Bay Transportation Authority
Full party name:	Massachusetts Commission Against Discrimination
Note:	Released as Stonehill College v. MCAD

INVOLVED PARTY	ATTORNEY APPEARANCE
Mass. Bay Transportation Authy. Plaintiff/Appellant Blue br, app & reply Br filed 18 Main Br., 18 App., 18 Reply Br. 1 Extension, 39 Days	Walter M. Foster, Esquire H. Reed Witherby, Esquire Sarah E. Lent, Esquire
MA Comm. Against Discrimination Defendant/Appellee Red brief filed 18 Main Br. 1 Extension, 32 Days	Robert L. Quinan, Jr., A.A.G. Simone Liebman, Esquire Beverly I. Ward, Esquire
Geraldine Ross Defendant/Appellee Red br, app & reply br filed 18 Main Br., 18 Reply Br. 1 Extension, 32 Days	Robert S. Mantell, Esquire Kevin G. Powers, Esquire Harold L. Lichten, Esquire Lara Sutherlin, Esquire Inactive
MA Employment Lawyers Assoc. Amicus Amicus brief filed 18 Main Br.	James S. Weliky, Esquire Laura M. Unflat, Esquire Robert S. Mantell, Esquire
Attorney General Amicus Amicus brief filed 18 Main Br.	John E. Bowman, Jr., Esquire

Women's Bar Association Amicus	Ellen J. Zucker, Esquire
New England Legal Foundation Amicus Amicus brief filed 4 Main Br.	Christine Hughes, Esquire
Associated Industries of Mass. Amicus On brief of another party	Christine Hughes, Esquire
Boston Area Mangt. Attys. Group Amicus On brief of another party	Arthur G. Telegen, Esquire Anjali Parekh Prakash, Esquire Richard L. Alfred, Esquire Sally Adams, Esquire James M. Paulson, Esquire
Town of Agawam Amicus Amicus brief filed 18 Main Br.	David A. Robinson, Esquire
Nat'l Employment Lawyers Assoc. Amicus	James S. Weliky, Esquire Laura M. Unflat, Esquire
Halifax & Barnstable Housing Aut Amicus	Martin J. Rooney, Esquire
Jewish Alliance for Law & Social Amicus Amicus brief filed 18 Main Br.	Joel P. Suttenberg, Esquire

American Civil Liberties Union Amicus Amicus filed brief 18 Main Br.	Sarah R. Wunsch, Esquire Anne L. Josephson, Esquire Ellen J. Zucker, Esquire James S. Weliky, Esquire Nadine Cohen, Esquire
Women's Bar Assoc. of MA Amicus On brief of another party	Sarah R. Wunsch, Esquire Anne L. Josephson, Esquire Ellen J. Zucker, Esquire James S. Weliky, Esquire Nadine Cohen, Esquire
Lawyers' Comm't for Civil Rights Amicus On brief of another party	Sarah R. Wunsch, Esquire Anne L. Josephson, Esquire Ellen J. Zucker, Esquire James S. Weliky, Esquire Nadine Cohen, Esquire
GLAD Amicus On brief of another party	Sarah R. Wunsch, Esquire Anne L. Josephson, Esquire Ellen J. Zucker, Esquire James S. Weliky, Esquire Nadine Cohen, Esquire
MA Lesbian and Gay Bar Assoc. Amicus On brief of another party	Sarah R. Wunsch, Esquire Anne L. Josephson, Esquire Ellen J. Zucker, Esquire James S. Weliky, Esquire Nadine Cohen, Esquire
Acushnet Housing Authority Amicus Amicus brief filed 18 Main Br.	Martin J. Rooney, Esquire

DOCKET ENTRIES

Entry Date	Paper	Entry Text
04/29/2003	#1	Entered. Notice to counsel.
04/29/2003		Transferred from Appeals Court: No briefs have been transferred.
05/02/2003	#2	Letter from Mass. Bay Transportation Authority regarding the briefing schedule: The motion to extend time to file appellant's brief was allowed by the Appeals Court to 6/27/03. (Noted)
05/05/2003		ALLOWANCE (prior motion w/appeals was allowed) of Paper #2 to 06/27/2003 for filing of brief of Plaintiff/Appellant Mass. Bay Transportation Authy.. Notice to counsel.
07/01/2003	#3	SERVICE of brief & appendix for Plaintiff/Appellant Mass. Bay Transportation Authy. by Walter M. Foster, Esquire, H. Reed Witherby, Esquire.
07/08/2003	#4	MOTION TO EXPAND THE RECORD, filed for Mass. Bay Transportation Authy. by Walter M. Foster, Esquire, H. Reed Witherby, Esquire, Sarah E. Lent, Esquire. *Referred to the quorum. Notice sent.
07/14/2003	#5	OPPOSITION to Paper #4 (Motion to Expand the record), filed by Massachusetts Commission Against Discrimination and Geraldine Ross. *REFERRED TO THE QUORUM. NOTICE SENT.

07/23/2003	#6	NOTICE of October argument sent.
07/24/2003	#7	MOTION to extend to August 29, 2003, filing of brief of Mass. Commn Against Discriminatn & another by Simone Liebman, Esquire, Robert L. Quinan, Jr., A.A.G., Harold L. Lichten, Esquire, Lara Sutherlin, Esquire.
07/24/2003		ALLOWANCE of Paper #7 to 08/29/2003 for filing of brief of Defendant/Appellee Mass. Commn Against Discriminatn. Notice to counsel.
08/29/2003	#8	MOTION TO FILE AMICUS BRIEF, filed for Massachusetts Employment Lawyers Association by Robert S. Mantell, Esquire.
08/29/2003	#9	SERVICE of amicus brief for Massachusetts Employment Lawyers Association by Robert S. Mantell, Esquire.
08/29/2003	#10	SERVICE of brief for Defendant/Appellee Geraldine Ross by Harold L. Lichten, Esquire, Lara Sutherlin, Esquire.
08/29/2003	#11	SERVICE of brief for Defendant/Appellee Mass. Commn Against Discriminatn by Simone Liebman, Esquire, Robert L. Quinan, Jr., A.A.G.
09/10/2003	#12	MOTION to extend to 9/18/93 filing of reply brief of Mass. Bay Transportation Authy. by Walter M. Foster, Esquire. *ALLOWED. Notice sent.
09/11/2003	#13	ORDERED for argument on October 7. Notice sent.

09/18/2003	#14	SERVICE of appellant's reply brief for Mass. Bay Transportation Authy. by Walter M. Foster, Esquire, H. Reed Witherby, Esquire, Sarah E. Lent, Esquire.
09/19/2003	#15	APPEARANCE of Robert S. Mantell, Esquire for Geraldine Ross. (Noted)
10/01/2003	#16	SERVICE of amicus brief for Amicus Atty. General by John E. Bowman, Jr., Esquire
10/07/2003		Oral argument held. (CJM G I S C SN CY).
10/16/2003	#17	ORDER (By the Court): This case will be reargued at the Court's February, 2004, sitting. The parties may, if they wish, file supplemental briefs or memoranda on or before January 15, 2004, on the question whether Dalis v. Buyer Advertising, Inc., 418 Mass. 220 (1994), was correctly decided. See attached copy of amicus announcement. (Notice to counsel.)
10/16/2003	#17.5	ANNOUNCEMENT: Theses cases (SJC-9002, -9081, -9100, -9112) involve a variety of issues regarding the assertion of jury trial rights by parties that were respondents in proceedings before the Massachusetts Commission Against Discrimination. See Lavelle v. MCAD, 426 Mass. 332 (1997). Amici are invited to address the various issues raised by the parties as well as the additional question, not raised by the parties, whether Dalis v.

		Buyer Advertising Inc., 418 Mass. 220 (1994) was correctly decided. Arguments are scheduled for Feb. 2004. (Distributed to list on file.)
10/23/2003	#18	Additional 12 copies of brief, reply brief and record appendix filed by Mass. Bay Transportation Authy..
12/16/2003	#19	NOTICE of February argument sent.
01/08/2004	#20	ORDERED for argument on February 3. Notice sent.
01/09/2004	#21	MOTION to extend to 1/20/2004 filing of Supp. Br. for Mass. Commn Against Discrimination by Robert L. Quinan, Jr., A.A.G.. *ALLOWED. No further extensions. Notice sent.
01/12/2004	#22	MOTION to extend to date filing of Supp. Br. for MA Comm. Against Discrimination by Stephen S. Locke, Esq. Allowed. Notice.
01/13/2004	#23	SERVICE of amicus brief for Amicus Town of Agawam by David A. Robinson, Esquire.
01/15/2004	#24	MOTION to extend to January 23, 2004, filing of Amicus Brief, filed for Nat'l Employment Lawyers Assoc. by James S. Weliky, Esquire, Laura M. Unflat, Esquire.
01/15/2004	#25	SERVICE of supplemental brief filed for Geraldine Ross by Robert S. Mantell, Esquire, Kevin G. Powers, Esquire, Harold L. Lichten, Esquire.
01/16/2004	#26	MOTION TO FILE AMICUS BRIEF, filed for Halifax & Barnstable Housing Aut by Martin J. Rooney, Esquire. *Amicus brief to be filed

		w/a motion to file late. Notice sent.
01/16/2004	#27	SERVICE of supplemental brief filed for Mass. Bay Transportation Authy. by Walter M. Foster, Esquire, H. Reed Witherby, Esquire, Sarah E. Lent, Esquire.
01/20/2004	#28	MOTION TO FILE AMICUS BRIEF, filed for New England Legal Foundation & others by Christine Hughes, Esquire, Arthur G. Telegen, Esquire, Richard Alfred, Esquire, James M. Paulson, Esquire.
01/20/2004	#29	SERVICE of for Amicus New England Legal Foundation & others by Christine Hughes, Esquire, Arthur G. Telegen, Esquire, Richard L. Alfred, Esquire, James M. Paulson, Esquire. *(18) copies filed also addressing SJC-9081, SJC-9100, SJC-9112.
01/22/2004	#30	MOTION to File Non-Conforming Brief One-Day Late, filed for MA Comm. Against Discrimination by Robert L. Quinan, Jr., A.A.G.. *Late filing accepted. Referred to the Justices in all other respects.
01/22/2004	#31	SERVICE of supplemental brief filed for MA Comm. Against Discrimination by Robert L. Quinan, Jr., A.A.G.. *10 copies.
01/22/2004	#32	SERVICE of amicus brief for Amicus Jewish Alliance for Law & Social by Joel P. Suttenberg, Esquire. *18 Joint copies filed for SJC-9002, SJC-9112, SJC-9081, SJC-9100.

01/23/2004	#33	SERVICE of amicus brief of MA Employment Lawyers Assoc. by James S. Weliky, Esquire, Laura M. Unflat, Esquire.
01/23/2004	#34	MOTION TO FILE AMICUS BRIEF, filed for American Civil Liberties Union and others by Sarah R. Wunsch, Esquire, Anne L. Josephson, Esquire, Ellen J. Zucker, Esquire, James S. Weliky, Esquire, Nadine Cohen, Esquire.
01/23/2004	#35	SERVICE of amicus brief for Amicus American Civil Liberties Union & others by Sarah R. Wunsch, Esquire, Anne L. Josephson, Esquire, Ellen J. Zucker, Esquire, James S. Weliky, Esquire, Nadine Cohen, Esquire.
01/26/2004	#36	MOTION TO FILE AMICUS BRIEF, filed for Achusnet Housing Authority by Martin J. Rooney, Esquire.
01/26/2004	#37	SERVICE of amicus brief for Amicus Achusnet Housing Authority by Martin J. Rooney, Esquire.
01/29/2004	#38	MOTION to Adjust the Allocation of Oral Argument Time, filed for MA Comm. Against Discrimination by Robert L. Quinan, Jr., A.A.G.. *Allowed as to allocation of requested time for argument.
01/29/2004	#39	MOTION to permit filing of reply brief and response to MCAD's motion to adjust Walter M. Foster, Esquire, filed for Mass. Bay Transportation Authy. by Walter M. Foster, Esquire. *Allowed.

		Reply brief to be filed on or before Feb. 26, 2004. *Notice sent.
01/29/2004	#40	MOTION for Leave to Participate in Oral Argument and to file Supplemental Brief, filed for New England Legal Foundation et als, by Christine Hughes, Esquire. ALLOWED. Amici may argue 7 mins. in SJC-9002. Amici may submit a supplemental brief on or before February 26, 2004. Notice.
02/02/2004	#41	MOTION to participate in oral argument, filed for American Civil Liberties Union by Sarah R. Wunsch, Esquire, Anne L. Josephson, Esquire, Ellen J. Zucker, Esquire, James S. Weliky, Esquire, Nadine Cohen, Esquire.
02/03/2004		Oral argument held. (CJM G I S C SN CY).
02/26/2004	#42	MOTION to File Supplemental Brief, filed for Geraldine Ross by Robert S. Mantell, Esquire, Kevin G. Powers, Esquire, Harold L. Lichten, Esquire. (Referred to the quorum)
02/26/2004	#43	SERVICE of appellee's supplemental brief for Geraldine Ross by Robert S. Mantell, Esquire, Kevin G. Powers, Esquire, Harold L. Lichten, Esquire. (Referred to the quorum)
02/26/2004	#44	SERVICE of supplemental amicus brief for New England Legal Foundation, Associated Industries for Mass. and Boston Area Management Atty. Group., filed by Christine Hughes, Esquire.

02/26/2004	#45	MOTION to File Supplemental Brief, filed for MA Comm. Against Discrimination & another by Beverly I. Ward, Esquire. (Referred to the quorum)
02/26/2004	#46	SERVICE of supplemental brief filed for MA Comm. Against Discrimination & another by Steven Locke, Esquire, Beverly Ward, Esquire, Lynn Milinazzo-Gaudet, Esquire.
03/01/2004	#47	SERVICE of appellant's reply brief for Mass. Bay Transportation Authy. by Walter M. Foster, Esquire, H. Reed Witherby, Esquire, Sarah E. Lent, Esquire. (Reply to Supplemental Brief). (Dist'd to the quorum)
03/29/2004	#48	SUPPLEMENTAL CITATION: Lavecchia v. Massachusetts Bay Transportation Authority, 441 Mass. 240 (2004), filed for Geraldine Ross by Harold L. Lichten, Esquire. *Distributed to quorum.
04/21/2004	#49	SUPPLEMENTAL CITATION filed for Mass. Bay Transportation Authy. by Walter M. Foster, Esquire. *Referred to the quorum.
05/03/2004	#50	NOTICE of Change of Firm Address filed by Walter M. Foster, Esquire.
05/06/2004	#51	RESCRIPT (Full Opinion): The Massachusetts Bay Transportation Authority's request in the Superior Court for a jury trial is struck. The case is to be deemed as a case filed in the Superior Court for review and

		decision under G.L. c. 30A, on the records prepared before the Massachusetts Commission Against Discrimination in the G.L. c. 151B, s. 5, proceedings. On this basis, the case is to stand for further proceedings in the Superior Court.
05/20/2004	#52	MOTION to remit issue of appellate attorneys fees to trial court, filed for Geraldine Ross by Robert S. Mantell, Esquire, Harold L. Lichten, Esquire.
05/28/2004	#53	OPPOSITION to Paper #52 (Motion of Appellee Geraldine Ross to Remit Issue of Appellate Attorneys Fees to Trial Court), filed by Mass. Bay Transportation Authy.. *Distributed to quorum.
05/28/2004	#54	JOINT MOTION to File Petition for Rehearing Late, filed for Mass. Bay Transportation Authy. by Walter M. Foster, Esquire, H. Reed Witherby, Esquire, Sarah E. Lent, Esquire. Allowed. (By the Court.)
05/28/2004	#55	PETITION FOR REHEARING, filed for Mass. Bay Transportation Authy. by Walter M. Foster, Esquire, H. Reed Witherby, Esquire, Sarah E. Lent, Esquire. *Filed collectively w/other parties.
06/03/2004	#56	DENIAL of petition for rehearing. (By the Court) Notice to counsel.
06/04/2004		RESCRIPT ISSUED to trial court.
07/21/2004	#57	MOTION for Reconsideration of the Court's Order to deny the award of Attorneys fees and costs, filed for Geraldine Ross by Robert S. Mantell, Esquire, Kevin G.

		Powers, Esquire, Harold L. Lichten, Esquire. (Denied) By the Court. Notice sent.
08/02/2004	#58	OPPOSITION to Paper #57 (Motion of Appellee Geraldine Ross for Reconsideration...), filed by Mass. Bay Transportation Authy.. *NOTED.
09/13/2004	#59	Notice: Certiorari petition filed in U.S. Supreme Court.
10/14/2004	#60	(Fax Copy) Joint Motion of the respondent employers for clarification of the S.J.C. record, filed by the parties. (Allowed) Notice sent.

APPENDIX B

Supreme Judicial Court
for the Commonwealth of Massachusetts
One Beacon Street, Third Floor,
Boston, Massachusetts 02108
(617) 557-1020

Walter M. Foster, Esquire
Smith & Duggan, LLP
Lincoln North
55 Old Bedford Road
Lincoln, MA 01773

RE: No. SJC-09002

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY
vs.
GERALDINE ROSS & another

NOTICE OF DENIAL OF PETITION FOR REHEARING

The Petition for Rehearing filed in the above captioned case has been considered by the court and is denied.

Susan Mellen, Clerk

Dated: June 3, 2004

To: Walter M. Foster, Esquire
Simone Liebman, Esquire
Robert L. Quinan, Jr., A.A.G.
Beverly I. Ward, Esquire
Harold L. Lichten, Esquire
Kevin G. Powers, Esquire
Robert S. Mantell, Esquire
James S. Weliky, Esquire

Laura M. Unflat, Esquire
John E. Bowman, Jr., Esquire
Ellen J. Zucker, Esquire
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